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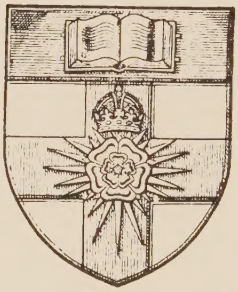

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152	8	1867	1877
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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

BIDDER *v.* BRIDGES.

C. A.
1884
KAY, J.
Jan. 17.
C. A.
Jan. 19, 25.

[1883 B. 6583.]

Practice—Evidence de bene esse—Witness above seventy years of age—Affidavit—Sufficiency of—Rules of Supreme Court, 1883, *Order* XXXVII., *rr.* 1–5; *Order* XXXVIII., *r.* 3.

The Court has jurisdiction on a proper occasion, when it is "necessary for the purposes of justice," to make an order for an examination *de bene esse* of witnesses upon an *ex parte* application, the order being taken by the applicant at his peril, and subject to the risk of being discharged on sufficient grounds.

An order was made in Chambers on an *ex parte* application by the Plaintiffs to examine *de bene esse* thirty witnesses upon an affidavit of the Plaintiffs' solicitor merely stating that he was advised that they were material witnesses—that they were all above seventy years of age, and that he was advised and believed that by reason of their age it was desirable that their examination should be taken without delay. This order was discharged by *Kay*, J., on motion in Court, mainly on the ground that the affidavit was insufficient.

Held, by the Court of Appeal (affirming *Kay*, J.), that the affidavit did not satisfy the requirements of Order XXXVIII., r. 3, but leave was given to put in a further affidavit stating what information had been obtained, and what steps had been taken to obtain such information as to the age of the different witnesses, and also stating generally the facts which the particular witnesses were going to depose to.

Although the fact that a witness is seventy years old is generally a good *primâ facie* ground for an order for his examination *de bene esse*, such a

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practice will not necessarily be applied to an extraordinary case, *e.g.*, where an order has been made to examine thirty witnesses.

On a subsequent application made on a further affidavit of the solicitor, in which he divided the witnesses into four classes who were to depose to four different heads of evidence:—

The Court declined to allow the examination *de bene esse* of ten of the proposed witnesses who were between seventy and seventy-five years old, without prejudice to a subsequent application for leave to examine them on grounds other than age, but allowed the other twenty witnesses above seventy-five to be examined *de bene esse* upon the undertaking of the Plaintiffs' counsel to produce at the trial, if so requested by the Defendant, any of such witnesses who might be then alive.

THIS was an action brought by Messrs. *Bidder* and *W. H. Nightingale*, on behalf of themselves and all other the proprietors and occupiers of lands and tenements in the parish or village of *Mitcham*, in the county of *Surrey*, against *N. Bridges*, *Henry Davis*, and *J. McRae*. The main question in the action was whether a certain corner of land at *Mitcham* formed part of *Mitcham Common*, and as such was subject to commonable rights. An order was made on the 28th of December, 1883, by Mr. Justice *Pearson* in Chambers, upon an *ex parte* application by the Plaintiffs that certain witnesses, thirty in number, named in a schedule to the affidavit of Mr. *Rooke*, the Plaintiffs' solicitor, should be examined *de bene esse* before a special examiner.

The affidavit described Mr. *Rooke* as one of the solicitors for the Plaintiffs, and was as follows: 1. The several persons whose names and addresses are set forth in the 1st and 2nd columns of the schedule hereto are, as I am advised, material witnesses in this action on behalf of the Plaintiffs.

2. The persons named in the schedule hereto are respectively upwards of seventy years old.

3. I am advised and believe that by reason of the age of the said witnesses it is desirable and important that these examinations should be taken without delay.

On the 17th of January, 1884, a motion was made before Mr. Justice *Kay* in Chambers on behalf of the Defendant *N. Bridges* to discharge the order so made.

On this application two questions were raised—first, whether the order was rightly made *ex parte*, and secondly, whether it was made upon sufficient evidence.

Hastings, Q.C., and *Kingdon*, for *Bridges*.

Kekewich, Q.C., and *P. H. Lawrence*, for the Plaintiffs.

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KAY, J.:—

This is an application to discharge an *ex parte* order made, I will assume by myself, on a former occasion. It was made in fact by one of the learned Judges to whom the business of this branch of the Court for the time was committed. It was an order directing the examination *de bene esse* of thirty witnesses, and the first question is whether it was proper to make such an order *ex parte*.

As to that the practice seems quite settled. In the case of *Bellamy* v. *Jones* (1) Lord *Eldon* says: "There are certain cases in which this order" (that is to examine *de bene esse*) "is made of course, as upon the ground of age. But if you come upon a case that you cannot arrange in that class, you must give notice." Then further he says: "The practice requires that you must swear, either that the witness is at the age of seventy, or is the only witness to the particular fact, or is in a dangerous state." Adopting those words, I find it stated, and it seems to me accurately stated, in *Daniell's* Chancery Practice (2): "An order for leave to examine a witness *de bene esse* upon the ground of the witness being seventy years of age, or dangerously ill, or about to go abroad, may be obtained either by motion in Court, without notice, or upon petition of course at the Rolls." But where the application is not made on these grounds, it should be with notice. Now the ground here is that these thirty witnesses are all of them of the age of over seventy years; but an application is made to discharge the order. And first of all it is said I cannot discharge the order. I certainly have not the smallest doubt that, where an order has been obtained *ex parte*, upon an application to discharge that order the parties who were not before the Court have just as much right to be heard, and to urge any ground for discharging the order, as they would have had, if they had been there when the order was made, to contend that it should not be made. If, therefore, for any reason

(1) 8 Ves. 31. (2) 4th Ed. 855.

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this order ought not to have been made, that reason presumably not having been present to the mind of the Judge who made the order, because the parties who were interested in objecting to the order were not there, I have no doubt the Judge who made the order is perfectly competent, on such an application as this, to discharge the order if he thinks right.

The objection now made is this. It is said that this order was made upon an insufficient affidavit. I cannot assume that the objections now raised before me were brought to the attention of the learned Judge who made the order. The affidavit is the affidavit of Mr. *Rooke*, who describes himself as one of the firm of *Rooke & Sons*, solicitors for the Plaintiffs, and the affidavit is in this form: "The several persons whose names and addresses are set forth in the 1st and 2nd columns of the schedule hereto are, as I am advised, material witnesses in this action on behalf of the Plaintiffs." The deponent does not say he believes it. He says he is advised. For anything that appears in this affidavit, he may know perfectly well, although he is so advised, that not one of them is a material witness. That is one objection. Then the next paragraph is this: "The persons named in the said schedule hereto are respectively upwards of seventy years old." Then he says: "I am advised and believe that by reason of the ages of the said witnesses, it is desirable and important that their examination should be taken without delay."

Now at the time when that affidavit was made, the 28th of December, 1883, the new Rules of Court were in force.

They came into operation on the 24th of October. I do not believe it much matters, because they are almost identical in terms with the former rule on this subject. The new rule which was then the governing rule is Order XXXVIII., r. 3: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted." In the first place, as I have pointed out, as to whether they are material witnesses or not, the deponent does not even say he believes it; and in the second place, as to whether they are seventy years old, he does not state the ground of his belief that they are seventy years, as to any one of them. Now it is

said that there is a universal practice to disregard this Order. Observe it is not a new Order. There was a similar Order under the *Judicature Acts* which preceded these new Orders, and not only that, but in 1861 there was an Order that "each statement in an affidavit shall shew the means of knowledge of the person making such statement," and even before that, under the previous Orders there was a similar Order. It is quite true it is common knowledge to all of us that in the negligent way in which affidavits are continually prepared and brought before the Court, this rule is systematically ignored. But does it follow that when a person against whom such an affidavit is made brings it to the knowledge of the Judge the Judge is bound to ignore the rule, and that the Court can say, because the rule is systematically disregarded by those whose duty it is to regard it, therefore the rule must be treated as obsolete and of no consequence? I dissent from any such proposition. If it be the case that the parties do not choose to bring the attention of the Court to the defect of an affidavit made in this way, and are content to take the judgment of the Court upon such an affidavit, that is one thing. It does not follow that the Court is always bound to take the objection, but where the objection is taken, and where it is an objection of substance, and not a mere technical and frivolous objection, it seems to me that the Court would be acting contrary to its plainest duty if it refused to observe the rule.

What is the case before me? This order, it has been rightly said, is of a very unusual kind, because of the large number of witnesses whom it is proposed to examine *de bene esse*. It is not one case in ten thousand in which there would be thirty material witnesses over seventy years of age to be examined. Therefore it is a case in which, if the order is made *ex parte*, it should be made upon very careful evidence, and the persons who apply for such an order ought to be extremely particular about the way in which they put in their evidence in support of the application, and it is their bounden duty to bring to the attention of the Judge the form of the affidavit they have made, and any objection that can be taken to it. In this case I have no doubt that no such care was taken. The affidavit is made in a form which is entirely wrong, and this order was obtained, I have not the

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least doubt, without the Judge's attention being called to the peculiar form of this affidavit. It would have been better on all grounds that this order should have been asked for, not *ex parte*, but upon notice, because, as I have said, the number of witnesses makes it material that the Defendants in the action should have an opportunity of themselves examining the matter and contesting the propriety of making such an order.

I now shall give the parties the choice of having this order discharged or of making a further affidavit; at present I will not deal with the costs if they adopt that latter alternative, but will reserve the question of costs until I see what the new affidavit is.

Kekewich, Q.C., elected to have the order discharged with costs (1).

From this decision the Plaintiffs appealed. The appeal came on for hearing on the 19th of January, 1884.

Kekewich, Q.C., and *P. H. Lawrence*, for the Appellants:—

The objection of Mr. Justice *Kay* was that the affidavit should have stated what inquiry the deponent had made as to the ages of the persons named in the schedule as persons whose evidence was material, and what steps he had taken to corroborate his statements. But for such an application as the present the affidavit is sufficient. The deponent states that he is solicitor for the Plaintiffs, and it must be presumed that the knowledge of the statements made by him is derived from his position as such solicitor. It is notorious that the provisions of the Order are not strictly adhered to.

That the order was rightly made *ex parte* is settled: *Bellamy* v. *Jones* (2). All that is necessary is that the affidavit should swear that the witness is of the age of seventy: *Daniell's* Chancery Practice (3), gives the rule in the same way—that where a witness is above seventy an order for leave to examine him will be made *ex parte* as of course, but in another case the application must be made on notice.

(1) On a subsequent application leave was given by *Kay*, J., to advance the case for hearing as soon as it was ready.

(2) 8 Ves. 31.

(3) 5th Ed. 817.

[COTTON, L.J., referred to *Rowe* v. —— (1).]

There Lord *Erskine* granted the application as of course in the case of the witness who was above seventy, and upon the usual affidavit that he was above that age. It was only in the case of witnesses below that age that he declined to make the order.

In *Tomkins* v. *Harrison* (2), Vice-Chancellor *Leach* said that the motion is of course where the witness is above seventy, and the rule is recognised by Lord *Langdale* in *M'Kenna* v. *Everitt* (3). The number of witnesses proposed to be examined is immaterial. Taken together they will constitute a perfect proof, which the failure of one or more will invalidate or weaken considerably, and it is obvious that the probability of death increases in proportion to the numbers. Several orders have been made in similar cases and upon such an affidavit as the present. The largest number of witnesses examined *de bene esse* on the ground of age was ten. It is true that no steps were taken to discharge that order.

Hastings, Q.C., and *Kingdon*, for the Defendant *Bridges*:—

This is not a technical but a substantial objection. The order made was a very exceptional order, having regard particularly to the large number of the witnesses, and it is not consistent with the practice of the Court as now regulated by Order XXXVII., r. 5, which is the only rule under which such an examination can now be authorized.

Can it be said to be "necessary for the purposes of justice that thirty witnesses should be examined *de bene esse* to prove the same facts"—the same facts, it must be assumed, otherwise the affidavit should say that they are to be different facts? In *Warner* v. *Mosses* (4), the late Master of the Rolls lays down the rule which ought to govern the Court in granting applications like the present. Order XXXVII., r. 4, the rule then in force is identical with the present rule, Order XXXVII., r. 5, and points out that it must be necessary for the purpose of justice. It may be difficult to say where the line is to be drawn between what is a reasonable and an unreasonable number of witnesses, but here the line has clearly been transgressed, and although with the increase of

(1) 13 Ves. 261.
(2) 6 Madd. 315.
(3) 2 Beav. 188.
(4) 16 Ch. D. 100.

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numbers the probability of death also increases, the injury caused by such deaths diminishes in an equal ratio.

This kind of application is always watched, as Lord *Eldon* says in *Bellamy* v. *Jones* (1), with the greatest jealousy.

The affidavit is clearly insufficient. The deponent does not shew that he has any knowledge at all on the subject of the statements contained in it: *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (2); *Hope* v. *Hope* (3); Order XXXVIII., r. 3.

Kekewich, in reply.

EARL OF SELBORNE, L.C.:—

The principles on which this appeal is founded are of some general importance. Therefore I think it right to state my view of them before mentioning what the Court thinks the proper thing to do.

There are two of the present General Orders which affect this question. The first is Order XXXVII., rule 5, which enables the Court, but only when it thinks it necessary for the purposes of justice, to direct an examination to be taken in this way. It appears to me, without reference to anything that may have been said in earlier times, when that rule was not in force, that under such a rule, at all events if the Court is satisfied either when the application is made, or, upon an application to discharge an order granted *ex parte* for the examination of witnesses *de bene esse*, that it is not necessary for the purposes of justice either altogether or to the extent to which it goes, then the Court ought not to grant it in the one case and ought not to maintain it any further than is necessary in the other. The other material Order is Order XXXVIII., rule 3, which relates to affidavit evidence. I do not think this Court can for a single moment give countenance to the notion that any common neglect, if there be such common neglect, of the provisions of that Order can absolve persons from the consequences of disregarding them when the question is raised, as it is here raised, by a person having a right to raise it. That Order requires, in effect, that affidavit evidence

(1) 8 Ves. 32.
(2) 20 Ch. D. 501, 508.
(3) 3 Beav. 317.

as to matters of fact by a person who is not able strictly to prove them, must shew, not only the fact but also the grounds of his belief. Those are the Orders upon which this question depends. Now I assume that there is no objection, in a case in which the Court thinks it right, to an order being made *ex parte* for the examination of witnesses *de bene esse*. There may be many cases in which the ends of justice may require it; but every such order must be taken subject to being discharged if any persons seeking to discharge it can shew that it was not proper, because not necessary for the purposes of justice; and I cannot think that the earlier authorities, such as that before Lord *Eldon*, of *Bellamy* v. *Jones* (1), and others which have been mentioned, really meant more than this, that *primâ facie*, and for the purpose of the question whether the order was regularly made *ex parte* or not, if it were brought within a certain category of cases it would be right and not irregular to obtain it *ex parte*. I do not understand Lord *Eldon* as having meant to lay down, even as to those cases in which there would be sufficient *primâ facie* ground for obtaining an *ex parte* order to examine witnesses *de bene esse*, that no reasons or grounds could be shewn why upon a motion to discharge such an order, consistent with its formal regularity, it should be discharged. To take this very matter of the witnesses being seventy years of age, which is generally a good *primâ facie* ground for an order to examine witnesses *de bene esse*, such a general practice is, like all other legal rules, adapted to ordinary cases; and if it is applied in an extraordinary manner—in a manner which the ends of justice do not require—which the principle does not make necessary although the order may not be irregular—even if there be proper evidence that the witnesses were above seventy years of age, there is nothing in the practice to prevent the Court from discharging or varying such an order upon a proper application, under the particular circumstances of the case. Such a practice is intended to apply where there are particular witnesses to particular facts, whose evidence may be of serious moment in the action, and the loss of whose evidence may possibly be fatal to the ends of justice. But the more you multiply witnesses of the same class to the same facts—particularly in cases of such a nature as

(1) 8 Ves. 31.

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this, depending upon custom, reputation, and the like—the more you weaken the ground of that general rule as applied to the particular case, and the more necessary, as it appears to me, you make it to satisfy the Court that there is substantial reason for apprehending that the ends of justice may be defeated if a great number of witnesses are not examined in that manner. I do not think the Court can take upon itself to define the maximum number of witnesses which in a case of this nature may, upon evidence of their age only, be proper to be examined. But I do think that when it is intended to apply that general practice to such a case as the present, and in such a wholesale way, it is necessary that the Court should have more reason for it than the mere fact that the whole of that number of witnesses, without saying what each or any one of them is to depose to, are above seventy years of age; and therefore, if the technical objections to the affidavit in this case were of less weight than they seem to me to be, I should be disposed to require some further information as to the nature of the evidence which these particular witnesses are expected to give, and also as to the actual ages of the witnesses. For instance, we have been told that one or more of them is above ninety. That might of itself, if he is a material witness at all, put an end to the question. He ought to be examined. Others are said to be above eighty. It might be so as to them too; but the mere fact of a great number of witnesses having turned seventy, without more, does not appear to me to be a sufficient reason why they should all be examined in this way, especially when no extraordinary delay of the trial is likely to occur.

The learned Judge in this case, looking at that affidavit, has said that it does not comply with the requirements of Order XXXVIII., rule 3. I quite agree with him. I think it does not. A gentleman of whom I desire to speak with all possible respect, and who I have no doubt intended to do his duty in the most upright way, but yet who gives the Court no reason to believe that he has any personal knowledge whatever of the ages of any of these witnesses, makes an affidavit in the form of a positive statement that they are all above seventy. Now would that be any *primâ facie* evidence whatever, even for the purposes of an interlocutory order,

of that fact, as to any one of them, in any other case? I think not. It appears to me that the Court ought to know specifically what information as to the age of each of those persons he has received, and what means have been taken to inquire in the best quarters upon that subject, and on what his belief is founded. I think it ought also to appear what is the nature of the evidence which these persons are to give. Beyond that, of course, it is not the office of the Court to tell the parties what affidavit they are to make. They must make the best affidavit they can and its sufficiency will be judged of. We think, however, that it would not be satisfactory to deprive the Appellants of the opportunity of making a further affidavit, or to compel them to initiate a new proceeding altogether. Of course they will understand that they can obtain that indulgence only on the terms of paying the costs of this motion here and below. But on those terms we think it right that they should have an opportunity of making a further and better affidavit, and that the case should be adjourned for the Court to determine whether upon such an affidavit the order should stand, or to any extent be varied.

COTTON, L.J.:—

I agree, and I agree so thoroughly with the reasons given by the Lord Chancellor, that I should add nothing were it not a case of importance, and as far as I know the first case in which this sort of question has been discussed under the Judicature Rules. Of course questions have been discussed on applications to examine witnesses abroad, but this question, as far as I know, has not arisen. Now there is an order which the Lord Chancellor did not in terms refer to, although he did impliedly, besides those which he mentioned, namely, the 1st rule of the XXXVIIth Order, which provides that subject to these rules the witnesses at the trial of any action are to be examined *vivâ voce* in open Court, and therefore, in order to exempt a party from the necessity and the prejudice, if he cannot bring the witnesses into open Court, of not being able to do so, one must see that there is something in these rules which enables the Court to direct that the examination of the witnesses shall be taken in some different way, and that is rule 5. That says, "That when the Judge is

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satisfied, and when it shall appear necessary for the purposes of justice, the Judge or the Court may make an order for the examination of the witnesses before an examiner." That applies to this case just as much as it does to the examination of witnesses abroad. What we have to consider, therefore, is whether we are satisfied on the evidence before us that it is necessary for the purposes of justice that these witnesses should be examined.

Now I am of opinion that this order cannot be said to be irregular because it was made *ex parte*. In my opinion it would be most unwise, and it might be in many cases most injurious to the necessities of justice, that the Court should say that it has no power to make an order *ex parte* under this rule to examine witnesses if sufficient cause is shewn. But then if it is made *ex parte*, of course anyone who objects to that order and says it is not necessary for the purposes of justice, must have a right to come into Court and say, "This order, although I cannot say its being made *ex parte* makes it irregular, must be examined on my objection which of course could not be heard when it was made *ex parte*." That is, I think, the way in which the matter is to be dealt with. What is the present case? There are thirty witnesses to be examined, and we really know nothing as to what those witnesses are to be examined to, with one exception. With regard to the Common-keeper one may tell very well what he is going to be examined to, and if the order were to be made, if only there were satisfactory evidence, which there is not, that he was seventy years of age, I do not think the order to examine him could be successfully objected to. There are thirty witnesses, and that being the case, in my opinion it stands in a very different position from what such an order would do were it desired to examine, not thirty witnesses, but two or three who were sworn to be witnesses material to the plaintiff's or defendant's case. It is very true, and as Mr. *Kekewich* says, obvious, that when there are thirty witnesses it is very much more probable that some of those will die before the hearing than it is where there is only one witness; but if there are thirty witnesses whose evidence is material, and it is not shewn that any of those material witnesses are the only witnesses who can speak to particular facts, although the Plaintiff may lose probably the evidence of one or two of

them, and in that way be prejudiced, in my opinion the number of the witnesses makes it very much less probable that the necessities of justice will require that there should be this examination of all of them before the hearing of the cause. It is improbable, unless we know what the witnesses are to speak to, that the loss of one of them will materially interfere with the Court's ability at the trial of the action to do justice between the parties, and to decide upon the facts according to the rights of the parties. Therefore I quite concur with the order which has been proposed by the Lord Chancellor. We do not at all say that if there is evidence proving conclusively that all these witnesses are above seventy, the order would on that alone be made. The Plaintiffs must judge for themselves when they bring the matter on again what evidence they will adduce.

A further affidavit was filed by Mr. *Rooke* on the 22nd of January, 1883, in which he deposed that the statements as to their recollection of facts which were in issue in the action by the old persons scheduled to his former affidavit had been all taken down in writing from their own mouths, either by himself or by a Mr. *Lloyd*, his managing clerk, also a solicitor in whose ability and accuracy he placed entire reliance—or by a Mr. *Vernon*, who had been appointed by a committee of the class of persons represented by the Plaintiffs with the object of finding out and interrogating old persons in *Mitcham* for the purposes of the action, and who had been so engaged for eighteen months—and that the statements in his former affidavit were based on knowledge, information, and belief derived from the above-mentioned sources, and that he believed they were strictly accurate. That the statements in his former affidavit as to the age were derived from statements made by the witnesses themselves to himself, *Lloyd*, or *Vernon*. It appeared from the schedule to the further affidavit that Mr. *Rooke* himself saw five, *Vernon* three, and *Lloyd* the rest. It further appeared from the schedule that ten were between seventy and seventy-five, nine (including one since dead) between seventy-five and eighty, nine between eighty and eighty-five, one of eighty-nine, and one of ninety-four.

The affidavit divided the proposed witnesses into four classes:

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(1.) Witnesses to parcels—to prove that the disputed plot, prior to the *Inclosure Act*, 1820, formed part of the common. (2.) Witnesses to perambulations—to prove that it was situate within the parish bounds. (3.) Witnesses to common rights—those who had exercised, or could speak to the exercise by others, of common rights over the property. (4.) Witnesses to recreation rights—those who had exercised, or could speak to the exercise by others of games over the property.

In class 1 there were eight witnesses, including one also in class 3. In class 2, nine—speaking solely to perambulations. In class 3, ten, including one in class 1 and three in class 4. In class 4, seven, including three in class 3, and one who was dead.

Of the ten witnesses between seventy and seventy-five, only one was in class 1, only two in class 2, two in classes 3 and 4, four in class 3 only, one in class 4 only.

He further stated that in his professional judgment as solicitor for the Plaintiffs, and after consideration with counsel on the character of the necessary evidence previously to and at the time of making his former affidavit, he believed and still believed that the several persons were necessary and material witnesses for the Plaintiffs—that although under the several heads the evidence derived from the different persons was directed to the same main issue, yet the experience of each of such persons was different according to circumstances of their residence or station in life from that of the others, and consequently their evidence could not be of an entirely uniform character, but collectively would constitute sufficient proof to support the Plaintiffs' case, and that he was unable to say that the evidence of any of the said persons could be safely dispensed with in the interests of justice for the fair trial of the action.

Jan. 25. On this day the application was renewed by *Kekewich* on behalf of the Plaintiffs. He read and commented on the further affidavit and submitted that the order of Mr. Justice *Pearson* was right.

Graham Hastings submitted that the points to be deposed to were intimately connected, and that it would be quite sufficient

for the purposes of justice if the Plaintiffs would select out of each class three at the outside who by reason of age or infirmity were most likely to die.

In answer to a suggestion by Earl *Selborne*, *Kekewich* assented to give an undertaking that if requested by the Defendant at the trial he would call any of the witnesses who should have been examined *de bene esse* who might be alive at the trial.

EARL OF SELBORNE, L.C. :—

That undertaking being given, we are of opinion that, upon the principles we stated before, it is not necessary in this case to examine *de bene esse* any witnesses merely because they are above seventy years of age and under seventy-five. We do not think that the presumption of death before this cause can be heard is sufficiently great to make it necessary to give power to examine *de bene esse* any witnesses within those limits of age, having regard to the number of the other witnesses and the distribution of the subject-matter of their evidence which has been stated. We do not therefore allow these witnesses to be examined. With regard to those above seventy-five, it is impossible not to feel that every additional year increases the risk of their not being alive even within a short period of time. There may be perhaps some doubt as to those between seventy-five and eighty, but as to those beyond eighty there can be no doubt.

Therefore, upon the whole, though rather reluctantly as far as I am concerned, having regard to the number of the witnesses, we think that it is the safest course to permit the examination of the witnesses above seventy-five years of age upon the undertaking which Mr. *Kekewich* has given, and upon his paying the costs.

Kekewich :—

The order will not prejudice the Plaintiffs if they come to the Court for leave to examine any of the witnesses between seventy and seventy-five upon the ground of illness or infirmity.

EARL OF SELBORNE, L.C. :—

That must be so understood, viz., that if as to a particular witness

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you can make a different case from that of age alone you are not prejudiced by the order we now make.

Solicitors for Appellants: *Rooke & Sons.*
Solicitors for Defendant: *Bridges, Sawtell, & Co.*

M. W.

C. A. 1884 *Feb.* 6.

In re GREEN. GREEN *v.* GREEN.

[1881 G. 1813.]

Solicitor—Charging Order for Costs—23 & 24 Vict. c. 127, *s.* 28 [*Revised Ed. Statutes, vol. xiii., p.* 881]—*Time for raising Costs.*

A decree for administration of a testator's estate was made at the suit of an infant who was entitled to a contingent reversionary share in the estate. *R.* was solicitor for the Plaintiff and for *J.* and *A.*, two of the persons entitled to the other shares. After decree he ceased to be solicitor for these parties, and obtained an order directing taxation of his costs as their solicitor in the action, including the costs of the application, and charging their shares in the estate with the payment of such costs, with liberty to apply to have them raised. He now, the cause not yet having been heard for further consideration, applied to have the costs raised by a sale of the shares charged:—

Held, affirming the decision of *Bacon*, V.-C., that the application was premature, and that no order ought to be made for raising the costs until the cause was heard for further consideration.

M. A. GREEN, by will, dated the 26th of September, 1865, gave her real and personal estate to the Defendant *H. T. Green* and another person, who died in her lifetime, upon trust for conversion and investment, and to pay the income to *H. T. Green* for his life, and after his decease to hold the fund upon trust for such of her six children, namely, *Julia A. Green, Henry W. Green, Peter P. Green, Richard Green, Alfred Green*, and the Plaintiff *Francis James Green*, as being sons should attain twenty-one, or being daughters attain that age or marry, and such other children of the testatrix as being sons should attain twenty-one, or being daughters attain that age or marry. She died in 1875, leaving the six above-named legatees and no other children surviving her. This action was commenced in 1881 on behalf of the above

Francis James Green, an infant, by his next friend, against *H. T. Green* for administration of the estate of the testatrix. A judgment for administration was given on the 21st of April, 1883.

Mr. *Robertson* acted as solicitor in the action for the Plaintiff and for *Julia A. Green* and *Alfred Green*. Shortly after judgment he ceased to be employed as their solicitor, and on the 29th of May, 1883, on his application, an order *nisi* was made that the shares and interests of the Plaintiff and *Julia A. Green* and *Alfred Green* respectively in £4150 1*s.* 4*d.* cash in Court to the credit of the cause, or any other property recovered by or preserved for them respectively in the said suit, should stand charged with the payment to the applicant of the costs, charges, and expenses thereinafter directed to be taxed. It was ordered that no part of the cash should be paid out or dealt with without notice to *Robertson* until this order was made absolute or discharged. It was referred to the Taxing Master to tax the costs of the applicant as solicitor in this action for the Plaintiff and *Julia A. Green* and *Alfred Green* as between solicitor and client, including therein the costs of the application, with liberty to apply to have such costs when taxed raised and paid out of the shares and interests of the Plaintiff and *Julia A. Green* and *Alfred Green* in the fund.

On the 20th of June, 1883, the order was made absolute, and it was ordered that no part of the shares and interests of the Plaintiff and *Julia A. Green* and *Alfred Green* in the cash in Court should be paid out or otherwise dealt with without notice to *Robertson*.

On the 27th of November, 1883, the Taxing Master certified the costs at £265 8*s.* 6*d.*

On the 6th of December, 1883, *Robertson* took out a summons against the Plaintiff and *Julia A. Green* and *Alfred Green* asking that the £265 8*s.* 6*d.* might be raised by a sale, with the approbation of the Judge, of the shares and interests of the Plaintiff and of *Julia A. Green* and *Alfred Green* in the fund in Court, and be paid with the costs of and relating to such sale and the costs thereinafter mentioned to *Robertson*, and that the costs of the application as between solicitor and client might be taxed, raised, and paid in like manner.

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The summons was heard by Vice-Chancellor *Bacon* in Chambers and dismissed. *Robertson* appealed, and the appeal was heard on the 6th of February, 1884.

Warrington, for the Appellant:—

The Appellant has by virtue of the order made under 23 & 24 Vict. c. 127, s. 28, a charge upon the shares of his clients. It was held in *Pilcher* v. *Arden* (1) that the order ought not to direct a sale in the first instance, but give liberty to apply as to enforcing the charge, and this was done here. A direction for sale ought to be made, there being no reason why a person who obtains a charge of this kind should be in a worse position than any other incumbrancer.

W. P. Beale, contrà:—

The proper time for any application is after the order on further consideration. It is premature to apply for payment out of particular shares of costs which, at all events to a great extent, will, on further consideration, be ordered to be taxed and paid out of the estate.

[He was then stopped by the Court.]

Warrington, in reply:—

Some of these costs are not included in the costs which will be taxed on further consideration.

[COTTON, L.J.:—You have a stop order, so the fund cannot be dealt with in your absence.]

The Appellant ought not to be compelled to have the payment postponed.

EARL OF SELBORNE, L.C.:—

We are of opinion that the proper time for payment of these costs, so far as they are costs in the cause, has not arrived. If any of them are not costs in the cause we think that the proper time for separating them from the other costs has not arrived. In our judgment the Vice-Chancellor was right in refusing any

(1) 7 Ch. D. 318.

order as to raising the costs before the hearing for further consideration.

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COTTON, L.J.:—

I am of the same opinion.

Solicitors for Respondents: *Sharpe, Parkers, & Co.*
Solicitor for Appellant: *Robertson.*

H C. J.

In re CAMERON. NIXON *v.* CAMERON.

C. A. 1884 *Jan.* 28; *Feb.* 4, 13.

[1880. N. 3058.]

Will—Construction—Direction to Executors to pay Legacies "out of my Estate"—Direction to carry on Testator's Business.

A testator after giving legacies and annuities, proceeded to say: "My executors may realize such part of my estate as they think right and in their judgment to pay the aforenamed legacies." He then directed his business to be carried on till his son attained the age of thirty, but did not dispose of the profits, nor did his will contain any further disposition of his real or personal estate, except a gift of a particular house. The testator carried on his business in a freehold mill which was his own property.

Held, by the Vice-Chancellor of the Court of the County Palatine of *Lancaster*, that the testator died intestate as to his real estate except the house, that his business was to be carried on till the son attained thirty or further order, and that the profits after providing for the legacies and annuities went to the next-of-kin. That the testator died intestate as to his residuary personal estate, and that an occupation rent should be paid to the heir-at-law from the testator's death in respect of the real estate and the fixtures forming part thereof which were used in the business.

Held, on appeal (affirming the decision of the Vice-Chancellor), that the legacies were not charged on the real estate, for that the direction to the executors to realize such parts of his estate as they thought right to pay the legacies was satisfied by holding it to apply to property which they took as executors.

Held (reversing the decision of the Vice-Chancellor), that so long as the testator's business was continued for the purposes and under the directions of the will, the executors were entitled to the free use and occupation of the business premises, and of the fixed plant and machinery therein without paying any rent for the same.

But *held* (varying the decision of the Vice-Chancellor), that the descended real estate could not be affected by the direction to carry on the testator's

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business any further or otherwise than such carrying on might be necessary for payment of the legacies and annuities given by the will, and that, so soon as they were provided for, the direction to carry on the business became inoperative, and ceased to be binding either on the heir-at-law or the next-of-kin, and that any surplus profits which had arisen since the testator's decease after providing for the legacies and annuities, must be apportioned between the heir-at-law and the next-of-kin according to the values of the real and personal estate employed in the business.

JOHN HUGH CAMERON by will, dated the 17th of May, 1880, after revoking all former wills and appointing *T. J. Nixon* and *J. Dixon* executors, proceeded as follows: "I direct that all my just debts and funeral and testamentary expenses shall be paid in the first instance as soon as possible after my decease. I do hereby give and bequeath unto *Hannah Cameron*, my wife, the house in which she resides in *Cornbrook Park* and all the furniture therein, together with the sum of £3 10*s.* per week for her natural life. *Moses Cameron* my son I give the sum of £500 to be paid out of my estate, and the sum of shop wages per week until he is twenty-five years of age, to be paid out of the business. *Elizabeth Cameron* my daughter the sum of £2 per week, or may be invested for her sole use and her children if she should have any. *Ellen Cameron* my daughter the sum of £2 per week, or may be invested for her sole use and her children if she should have any. *Anne Fenwick* my sister the sum of £52 per year." [Then followed two other gifts of annuities of £52, and a number of pecuniary legacies to relatives, the total amount of legacies being £1263.] "My executors may realise such part of my estate as they think right and in their judgment to pay the aforenamed legacies. I direct the business to be carried on until my son *Moses* is thirty years of age, as follows: my present cashier *T. J. Nixon* to manage and conduct with the assistance of *T. Dixon* foreman-smith and *Thomas Wood* as shop foreman, for which they shall be paid reasonable remuneration. All the correspondence and accounts to be conducted by *T. J. Nixon* my said executor, and all cheques to be countersigned by his co-executor *Thomas Dixon* in addition to *T. J. Nixon's* signature. At the decease of my wife *Hannah Cameron* the property in which she now resides is to be equally divided among my children."

The testator died on the 18th of May, 1880, leaving his son and heir-at-law *Moses Cameron*, his wife *Hannah*, and his two daughters him surviving. *Moses Cameron* was born on the 9th of May, 1861. The testator carried on business as an engineer upon property of which he was owner in fee, subject to a rent-charge of £185 7*s*.

On the 9th of December, 1880, judgment was given by the Vice-Chancellor of the county palatine of *Lancaster* for administration of the estate, directing accounts and inquiries. On the 8th of August, 1882, the action came on for further consideration, and His Honour made an order which, so far as need be stated for the present purpose, was to the following effect.

Declare that according to the true construction of the testator's will he died intestate as to real estate, except the house in *Cornbrook Park* devised to the testator's wife *Hannah Cameron* for life, and after her decease to be equally divided among his children. Declare that the said *Hannah Cameron* is under the said will absolutely entitled to the furniture in the said house in *Cornbrook Park*. Declare that the testator's business under his will ought to be carried on by the receiver appointed in this action until the Defendant *Moses Cameron* attains the age of thirty years, or until a previous further order for the purpose of realizing money to pay the legacies given by the will, and that the surplus net profits of the business while so carried on, after providing sufficient funds for the payment of the said legacies and annuities, are to be deemed personal estate of the testator. Declare that the testator died intestate as to such surplus, and that the same is distributable as follows, viz., one third to the widow and the other two-thirds in equal shares among the three children. Liberty to apply as to such surplus net profits when there should be any. Liberty to apply as to the business when *Moses* attained the age of thirty years. Declaration that the testator died intestate as to the clear residue (if any) of his personal estate, and that it was distributable as thereinbefore declared as to the surplus net profits. Refer it to the district registrar to certify what parts of the machinery used in the testator's business were fixtures to and formed part of the testator's real estate, and what, having regard thereto, was the

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proper occupation rent with which the testator's business was to be charged as from the testator's death in respect of the testator's real estate used in or for such business.

One of the testator's daughters, still an infant, as one of the next-of-kin, appealed against the first two of the above declarations, and against the above reference relating to the fixtures and the occupation rent. *Moses Cameron* gave a cross notice objecting to the declarations as to the carrying on the business, and as to the application of the profits.

Rigby, Q.C., and *S. Hall*, for the Appellant:—

We say that the real estate employed by the testator in the business at his death was to continue to be employed in it without paying rent to the heir: *M'Neillie* v. *Acton* (1). The direction to carry on the business could not be complied with unless the executors had the use of the buildings and machinery, they must take the business as they find it. The Vice-Chancellor said that he could find an intention that they should occupy the buildings, but not that they should occupy them rent free. If, however, there is an intention shewn that they should occupy, then they must occupy them rent free unless an intention is affirmatively shewn that they should pay rent.

Then we say that the legacies are charged on the real estate. The old cases went very strongly against disinheriting the heir, but the current of decision has now altered, and the rule is that the words of a will must have their natural effect given to them without any bias in favour of the heir: *King* v. *George* (2).

[COTTON, L.J.:—There is a direction to the executors to pay, and no real estate is given them, how do you make out a charge on the realty?]

If there is a direction to them to pay out of real estate, the real estate must be held and be devised to them sufficiently for that purpose. The legacy to *Moses* is given "out of my estate," and the executors are directed to realize such parts "of my estate" as shall be sufficient for payment. The legacies could not have been paid out of the personalty without stopping the

(1) 4 D. M. & G. 744, 755. (2) 5 Ch. D. 627.

business. The word "estate" includes real estate, and the executors must be held to take it for this purpose: *Bush* v. *Allen* (1); *Oates* v. *Cooke* (2); *Davies* to *Jones and Evans* (3); *Noel* v. *Hoy* (4); *Thomas* v. *Phelps* (5); *Jarman* on Wills (6). The statute 22 & 23 Vict. c. 35, ss. 14–18, does not appear to bear on the case, as the land is not wanted for payment of debts.

Gent, for the widow:—

If there were nothing in the will but the gift to the widow, then to prevent intestacy the life interest would be confined to the annuity. Then we have a gift in the first place which may be for life or absolute, and in the last clause there is a gift over of part of the property. This makes it most natural to hold the first gift to be absolute.

Hampson, for another daughter.

Robinson, Q.C., and *Methold*, for the heir-at-law:—

[EARL OF SELBORNE, L.C.:—We wish to hear you on the question whether a direction to carry on the business does not mean that it is to be carried on by means of the property which the testator employed in it?]

The questions are two. First, is the business directed to be carried on for the purposes of the will, or is it to be carried on for the purpose of giving the next-of-kin an interest in the profits of the business. If it was only for the purpose of paying debts and legacies, the appeal is idle, for there is personalty enough for those purposes. The object was to carry on the business for the benefit of the heir-at-law, upon whose property it was carried on.

[EARL OF SELBORNE, L.C.:—The business did not descend to him though the mill did.]

Gosling v. *Gosling* (7) is very similar to this case. The doctrine of *Ackroyd* v. *Smithson* (8) and the cases which have followed it, particularly *Fitch* v. *Weber* (9), furnishes a strong analogy in

(1) 5 Mod. 63.
(2) 3 Burr. 1684; 1 W. Bl. 543.
(3) 24 Ch. D. 190.
(4) 5 Madd. 38.
(5) 4 Russ. 348.
(6) 4th Ed. vol. i. pp. 728–730.
(7) Joh. 265.
(8) 1 Bro. C. C. 503.
(9) 6 Hare, 145.

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our favour. Where real estate is disposed of by will the heir-at-law is only excluded so far as is necessary to give effect to the gifts in the will—he is not excluded for the benefit of the next-of-kin.

Rigby, in reply:—

The direction is clear that the business shall be carried on for a particular period, and the heir cannot say that he is wronged by its being so carried on whatever the destination of the profits may be.

[EARL OF SELBORNE, L.C.:—Suppose a testator carrying on business upon a leasehold directs by will that the business shall be carried on for a certain time but makes no disposition of the proceeds, cannot any one of the next-of-kin say that this direction to carry on the business is inoperative?]

I should say not, though no doubt all of them together can. The testator evidently intended all that was made by the business to be part of his personal estate, and as he does not dispose of it it goes to the next of kin.

[EARL OF SELBORNE, L.C., referred to *Fitch* v. *Weber* (1).]

1884. 13th Feb. The case stood for judgment on this day.

Robinson then stated to the Court that it had been ascertained that there was personal estate enough apart from the business to provide for the legacies and annuities, and that the heir-at-law, the widow, and the next-of-kin, except one who was an infant, had entered into an agreement for carrying on the business for a term for their common benefit. That if the Court would sanction the retaining the infant's share of the personalty in the business the parties would prefer that being done, but if not her share could be paid out.

Rigby, for the infant, stated circumstances tending to shew that it would be for the infant's benefit to allow her share to remain in the business.

(1) 6 Hare, 145.

EARL OF SELBORNE, L.C.:—

We think it right to give our opinion on the points which have been argued, though the arrangement which has been made between the parties will render it unnecessary to carry our judgment into effect.

The judgment of the Court (Earl of *Selborne*, L.C., Lord *Coleridge*, L.C.J., and *Cotton*, L.J.) was then delivered by

EARL OF SELBORNE, L.C.:—

Several points were raised by this appeal from the order on further consideration made by the learned Vice-Chancellor of the Duchy of *Lancaster*.

The first declaration in that order is, that the testator, *John Hugh Cameron*, died intestate as to his real estate, except a certain house in *Cornbrook Park*. It was contended that this was wrong, and that the whole real estate (with that exception) was either devised by implication to the executors, or at all events, charged with the testator's legacies (of debts, there is no question, they have all been paid). That the real estate, except the house in *Cornbrook Park*, is not expressly devised, or expressly charged, is certain. The implication was sought to be raised, (1) from a direction that the first pecuniary legacy given by the will (a sum of £500) "be paid out of my estate," and (2) from the direction which follows, after all the legacies and annuities have been given, "My executors may realize such part of my estate as they think right and in their judgment to pay the aforenamed legacies." It was insisted that the words "my estate," thus used, comprehended real estate; as they no doubt might if a testator gave "all his estate" to his executors, or to any other devisees. But when an implication adverse to the heir-at-law is sought to be raised from a mere direction for payment of legacies, it is necessary to consider whether the words are not sensible without any such implication. The whole personal estate vests by law in the executors; the real estate does not. The personal estate not specifically bequeathed is generally the proper fund for the payment of pecuniary legacies. When a testator directs his executors to realize, for the payment of such legacies, "such part of his estate as they think right and in their judgment," it is reasonable

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to understand him to refer to the estate which vests in them as executors, and not to that which does not; and the direction in the earlier sentence of the same will, that a particular legacy is to be paid "out of his estate," naturally means that it is to be paid in a due course of administration. The special directions which this testator has given as to his business make the express power for the executors to "realize such part of my estate as they think right" by no means inofficious when limited to the personal estate: and no argument (whatever might be its value) from a presumption that the testator did not mean to die intestate, can be applicable in this case; because this testator did beyond question die intestate as to the general residue both of his real and of his personal estate. There is not room in this case even for the argument that the legatees will be disappointed unless the real estate is charged with the legacies; the probability, so far as yet appears, is that they may be paid in full. As to the real estate, therefore, we think the declaration that the testator died intestate is (so far) right. But it appears to us, that it ought to be qualified not only by the exception of the house in *Cornbrook Park* but also by the addition of the words "and except so far as relates to the use and occupation of the freehold property and fixtures found by the report to be employed for the purpose of the testator's business carried on at the *Oldfield Iron-works*, so long as it shall be necessary for the purposes of the will to carry on such business." To that subject we shall have occasion again to advert.

The next question arises upon the declaration that the testator's widow, *Hannah Cameron*, is under the will absolutely entitled to the furniture in the house in *Cornbrook Park*. From this, the legatees and next-of-kin have appealed; and on this point we are compelled to differ from the learned Judge, and to substitute a declaration that the widow is entitled to a life interest only in that furniture; and that, subject thereto, it forms part of the general personal estate not specifically bequeathed.

The words on which this question depends are: "I hereby give and bequeath unto *Hannah Cameron*, my wife, the house in which she resides in *Cornbrook Park*, and all the furniture therein, together with the sum of £3 10*s*. per week for her natural life."

The introductory words govern the whole sentence; and the concluding words, "for her natural life," in such a sentence, so constructed, are appropriate to describe the interest intended to be taken in all, and not only in the last antecedent of, the subjects governed by the verbs "give" and "bequeath." That this was the intention of the testator as to the first mentioned of those subjects (the house in *Cornbrook Park*) is apparent from the last part of the will, in which the testator says, "At the decease of my wife *Hannah Cameron*, the property in which she now resides is to be equally divided among my children." We cannot hold the furniture to pass to the children under this description. We think it would be unreasonable therefore to infer that, while the widow was to take the house which was mentioned first, and the annuity, which was mentioned last, for her life only, she was to take the furniture (which is mentioned between them in the same sentence) absolutely.

The remaining questions relate to the testator's business as a mechanical engineer at *Salford*, which appears to have been valuable and prosperous. As to this, his will contains the following direction. [His Lordship read the direction.] The testator died on the 18th of May, 1880. *Moses*, his eldest son and heir-at-law, was born on the 9th of May, 1861, and is, therefore, now of age: but he will not attain the age of thirty till May, 1891. Subject to this direction, the freehold premises at *Salford*, on which the business was and is still carried on, descended to him upon the death of the testator: and, subject to the payment of the testator's funeral and testamentary expenses, debts, and legacies, the general personal estate of the testator, including that employed in the business, was undisposed of by the will, and passed to the testator's widow and next of kin. The learned Vice-Chancellor has so declared; and on that point all parties are agreed. But the learned Vice-Chancellor has, by his order on further consideration, proposed to give effect to the testator's direction concerning the business, in a manner which, so far as it is favourable to the heir-at-law, was complained of by the next of kin, and, so far as it is favourable to the next-of-kin, was complained of by the heir-at-law, whose objection however was defensive, and might probably not have been urged but for the

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appeal of the next-of-kin. The Court declaring "that the business of the testator ought to be carried on by the receiver appointed in the action until the Defendant *Moses Cameron* attains the age of thirty years, or until a previous further order for the purpose of realising money to pay the legacies and annuities given by the will," has, in favour of the heir-at-law, charged the business with an occupation rent in respect of the testator's real estate used in and for the business, including such parts of the fixed machinery as ought to be deemed part of the real estate, and in favour of the next-of-kin the learned Judge has declared that "the surplus net profits of the business while carried on, after providing sufficient funds for the payment of the legacies and annuities, are to be deemed personal estate of the testator," as to which the testator died intestate, and which is distributable between his widow and next-of-kin according to the *Statute of Distributions.*

On the part of the Appellant, the next-of-kin, it was insisted (and we think rightly) that the direction to carry on the business contained in the will means that it should be carried on by the use and employment in it of the same property of the testator, whether real or personal, which was being employed therein at the time of his death; that the report finds what were the assets of the testator employed in his business at his death, which included the freehold plot of land and works and buildings constructed and erected thereon known as the *Oldfield Road Ironworks* (subject to a yearly rent of £185 7*s.*), and also the fixed plant and machinery thereon, and therefore that the executors were entitled under the will to the use and occupation of those premises, plant, and machinery for the purposes of the business, without paying any rent (other than the £185 7*s.* per annum), as long as the business should be carried on under the will. We think that (unless on the footing of some arrangement by way of compromise) that part of the Vice-Chancellor's order on further consideration which (in substance) refers it to the district registrar to fix an occupation rent to be charged against the business in favour of the heir-at-law in respect of the real estate and fixed machinery employed in the business cannot be supported, and must be varied, and that (unless rendered

unneccessary by the arrangement which has been mentioned at the Bar) a declaration should be substituted to the effect that, so long as the business is continued for the purposes and under the directions of the will, the executors will be entitled for those purposes to have the free use and occupation, (subject only to the rent of £185 7*s.* per annum), of the business premises and the fixed plant and machinery thereon.

This being so, the heir-at-law objected on his part to the declation contained in the Vice-Chancellor's order as to the time during which the business was to be carried on, and as to any surplus profits thence arising after providing sufficient funds for the payment of the legacies and annuities. Relying on the principles established in *Ackroyd* v. *Smithson* (1) and the other well-known authorities which have followed it, he said that the descended real estate could not be affected by the direction to carry on the business, any further or otherwise than might be necessary for the purposes of the will, that is for the payment of the pecuniary legacies and annuities, and that there was no gift by implication under this will to the prejudice of his right, in favour of the persons entitled to the personal estate by intestacy under the *Statute of Distributions.* This view is also in our judgment correct, and its consequence is that (unless by arrangement) the business ought to be carried on so long only as may be necessary for the payment of the legacies and annuities not otherwise sufficiently provided for, and that, when these are paid or properly provided for, the absolute direction in the will that it should be carried on until the testator's son *Moses* attains the age of thirty (without any gift of the profits thence arising during that period to any person) is inoperative, and does not bind either the heir-at-law or the next-of-kin. If there should be any surplus profits derived from carrying on the business since the testator's death after paying or fully providing for the legacies and annuities, these (in the absence of arrangement) must (we think) be apportioned between the heir-at-law and the persons entitled to the personal estate under the *Statute of Distributions*, in proportion to the respective values of the real and personal estate of

(1) 1 Bro. C. C. 503.

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the testator which have been employed in the business at the time of his death and from time to time afterwards, and so have contributed to the earning of such profits.

We are far from sure that it was not the intention of the learned Vice-Chancellor's order to arrive at substantially the same result and upon the same principles, though by different means. But an arrangement much resembling (except in detail) the Vice-Chancellor's order has been agreed to by the adult parties, and we are now asked to sanction it on the infant's behalf. This we cannot do upon the materials now before us, but we are willing to remit the cause to the Court below with such declarations as may be necessary to embody the principles on which we proceed, and with a direction that an inquiry should be made as to the course which it will be for the benefit of the infant to follow, either by adopting on her part the arrangement which the adult parties have made, or by raising her share of the estate out of the testator's assets in such manner and at such time as the Court may approve. Minutes may be prepared.

The costs of all parties of the appeal ought, we think, to be costs in the action, and to be paid out of the undisposed of personal estate.

Solicitors: *Withington, Petty, & Boutflower; Gregory & Co.; Hampson & Crosse, Manchester.*

H. C. J.

Ex parte ROGERS. *In re* PYATT.

C. A.
1883
C. J. B.
July 23.
C. A.
1884
Feb. 15.

Tenant for Life—Custody of Title Deeds—Trustee in Bankruptcy—Life Estate of Bankrupt's Wife.

The trustee in bankruptcy of a husband, whose wife is legal tenant for life of land (not to her separate use) has no absolute right to the custody of the title deeds of the land during the coverture, but the Court has a discretion as to the custody.

In a case in which there was evidence that a bankrupt's wife was about to apply to the Divorce Court for the dissolution of the marriage :—

Held, that the title deeds of land, of which she was legal tenant for life, ought not to be delivered to the trustee in the bankruptcy, but ought to be retained in Court, where the County Court Judge had, upon the trustee's application for delivery to him, ordered them to be deposited.

Per COTTON, L.J. :—Whether, under ordinary circumstances, an assignee from a husband of his right to receive during the coverture the rents of land of which his wife is legal tenant for life, is entitled as a matter of course to the custody of the title deeds, *Quœre.*

ON the 1st of May, 1883, *William Pyatt* was adjudicated a bankrupt in the *Nottingham* County Court. The bankrupt's wife was, under the will of her father, *Joseph Terry*, tenant for life of some freehold houses in *Nottingham*. The testator by his will, dated the 4th of January, 1854, devised the houses to his daughter, *Ann Terry*, for and during her life, with remainder to her issue living at her death. After the death of the testator *Ann Terry* married the bankrupt. The title deeds of the houses were in the possession of Mrs. *Pyatt*, but, after the presentation of the petition on which the adjudication of bankruptcy was made, *William Terry*, her brother, who was a trustee and executor under his father's will, took possession of the deeds.

The trustee in the bankruptcy applied to the County Court for an order directing *W. Terry* to deliver the deeds over to him. *W. Terry* had taken the deeds out of the bankrupt's house while a receiver under the petition was in possession of the bankrupt's property. In opposition to the application an affidavit was made by Mr. *Hind*, who had acted as solicitor for Mrs. *Pyatt*, in which he said that in April, 1883, the bankrupt had deserted his wife, leaving her, with a son who was almost blind, absolutely

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unprovided for. He said that he had been instructed by Mrs. *Pyatt* to commence proceedings in the Divorce Division for a dissolution of the marriage, and that he was in communication with his *London* agents with a view to the commencement of such proceedings. He added that he had already assured himself of being able to obtain evidence in support of those proceedings amply sufficient, in his opinion, to obtain a decree for the dissolution of the marriage. The Judge of the County Court adjourned the application *sine die*, but directed that the deeds should be forthwith lodged in the custody of the Registrar of the Court, with liberty for the trustee and his solicitors, and for Mrs. *Pyatt* and her solicitors, to inspect the same at any time. The trustee appealed to the Chief Judge. The appeal was heard on the 23rd of July, 1883.

Winslow, Q.C., and *Macaskie*, for the Appellant:—

The deeds were wrongfully taken out of the possession of the receiver. The *status* of a receiver in bankruptcy is the same as that of a receiver in Chancery, and no one, except a landlord, has a right to disturb his possession without the leave of the Court: *Ex parte Cochrane* (1). The creditors are injured by the adjournment *sine die*.

W. Phipson Beale, for the wife.

BACON, C.J., varied the order, by giving liberty to the trustee to apply to the Court as he might be advised.

J. B. D.

From this decision the trustee appealed.

The appeal was heard on the 15th of February, 1884.

Winslow, Q.C., and *Macaskie*, for the Appellant:—

The wife cannot have any claim to the property so long as the coverture exists; her interest during that period belongs to her husband, and it has passed to the trustee in the bankruptcy. There is no occasion for another motion to obtain a declaration

(1) 44 L. J. (Bkcy.) 87.

to that effect. Until the wife has taken some steps to obtain a divorce, or unless she gives an undertaking to commence proceedings, she cannot hinder the trustee from realizing the life interest for the benefit of the creditors. The legal tenant for life of freeholds is as a general rule entitled to the custody of the title deeds: *Allwood* v. *Heywood* (1); *Leathes* v. *Leathes* (2); *Davies* v. *Vernon* (3).

[COTTON, L.J.:—No doubt, if a wife is tenant for life of land, her husband in her right would be entitled during the coverture to receive the rents and to have possession of the title deeds. But, if he assigns his right to receive the rents, has it ever been decided that he can hand over to his assignee the right to the custody of the title deeds?]

In *Warren* v. *Rudall* (4) the deeds were in Court. In the present case they were not, until upon the hearing of this application the Judge ordered them to be deposited with the Registrar. In *Jenner* v. *Morris* (5) the tenant for life had previously taken the deeds out of the jurisdiction, and then an order was made by consent that the deeds, which were in Court, should be delivered out to him on his giving security for their safe custody. The trustee may be able to find a purchaser of the bankrupt's interest in the property, and, if he does, he ought to be in a position to hand over the deeds to the purchaser. The remaindermen raise no objection to the application, and there is no evidence of any danger to the deeds.

W. Phipson Beale, for the wife, was not heard.

BRETT, M.R.:—

I cannot see that there is any authority for saying that the Court is bound to order the title deeds to be handed over to the trustee in order that he may hand them over to a hypothetical purchaser. There is ample doubt whether he is entitled to have the deeds at all. There is sufficient doubt as to the law, and there is sufficient doubt as to the propriety of his having the

(1) 1 H. & C. 745.
(2) 5 Ch. D. 221.
(3) 6 Q. B. 443.
(4) 1 J. & H. 1.
(5) Law Rep. 1 Ch. 603.

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deeds for the avowed purpose of handing them over to a purchaser of a mere risk to enable the Court to decline in this case to make the order.

COTTON, L.J.:—

I am of the same opinion. The husband himself would be entitled to the custody of the deeds, because in law he and the wife are one person during the coverture. I do not intend to decide the point now, and it must not be supposed that I express any opinion, one way or the other, as to the right of a husband under ordinary circumstances to transfer to the assignee of his interest in his wife's life estate in land his right to the custody of the title deeds. In the present case there is a probability that the wife will shortly commence proceedings in the Divorce Division to obtain a dissolution of the marriage. The deeds are now in Court, and I think they ought to be kept there at present. If they were not already in Court, I think we should order them to be brought there.

BOWEN, L.J.:—

I am of the same opinion. As to the general right of a husband and of his trustee in bankruptcy to the custody of the title deeds of land of which the wife is tenant for life, I will say nothing. It seems to me clear that the trustee has not shewn that he is entitled *ex debito justitiæ* to an order to hand over the deeds to him. The Court has a discretion in the matter, and I think that discretion has been properly exercised in the present case.

Solicitors for Trustee: *Taylor, Hoare, & Co.* agents for *Maples & McCraith, Nottingham.*

Solicitors for Wife: *Torr & Co.*, agents for *Wells & Hind, Nottingham.*

W. L. C.

BURSTALL *v.* BEYFUS.

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[1883 B. 3520.]

Practice—Demurrer—Frivolous Action—Misjoinder—Dismissal of Action—Rules of Supreme Court, 1883, Order XXV., *rr.* 1, 3, 4—*Joinder of Solicitors for Purposes of Discovery or Costs—Order* XVIII., *r.* 1.

Order xxv. of the Rules of 1883, although in form abolishing demurrers, has merely substituted other modes of procedure by which the objects of a demurrer, so far as it served a beneficial purpose in obtaining a speedy decision of the point at issue, can now be attained.

Where the cause of action against one defendant is totally disconnected with that against the other defendants, except so far as it arises out of an incident in the same transaction there is a misjoinder, and it is not the case contemplated by Order xviii., rule 1.

Solicitors who were made parties with other defendants to an action, th statement of claim in which shewed no reasonable cause of action as against them:—

Held, entitled under Order xxv., rule 4, to an order dismissing the action as against them with costs, and striking their names out of the proceedings.

To make solicitors or others parties to an action without seeking any relief against them, except payment of costs or discovery, is vexatious.

THIS action was brought against Messrs. *Beyfus*, *Samuel Genese*, *Henry Kelly*, and *A. E. Wells*. The statement of claim alleged that the Plaintiff was entitled to a life interest in property under the will of his father, which will contained a clause of forfeiture in the event of the Plaintiff charging, or attempting to charge, the same. The statement of claim proceeded to allege a case of fraud against the Defendants (other than Messrs. *Beyfus*) in procuring from the Plaintiff promissory notes and a charge upon his life interest. As regards Messrs. *Beyfus* it alleged that they, acting as solicitors for the Plaintiff and the other Defendants, prepared such charge; that the Plaintiff had no independent advice; that the charge was read over, but never explained to him and that he executed it without understanding its purport or effect, or that he was charging or assigning his interest under the will of his father. By par. 10 he alleged that all the Defendants well knew that the charge would have the effect of forfeiting the Plaintiff's interest under the will, and the said charge was

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procured by the Defendants from the Plaintiff for the purpose of being oppressively used against him to induce him to meet the promissory notes.

By par. 12 it alleged that the Defendants Messrs. *Beyfus* charged the Plaintiff, and he paid them the sum of £23 for the preparation of the charge, which was under six folios in length, although the only work done by them was to dictate the charge to a shorthand writer, who copied the same out for the Plaintiff's signature. No bill of costs was delivered to the Plaintiff.

The Plaintiff claimed a declaration that the said charge was obtained by the Defendants by fraud, and was void as against the Plaintiff, an account of all moneys received from or paid to the Defendants, or any or either of them, by the Plaintiff, together with interest, and as regards the Defendants Messrs. *Beyfus* delivery and taxation of their bill of costs, payment, and damages.

On the 26th of November, 1883, the Defendants, Messrs. *Beyfus*, took out a summons under Order xxv., rule 4, asking that the action might be dismissed on the ground that it disclosed no reasonable cause of action, but that such action, as disclosed by the pleadings, was as against the said applicants vexatious, and for costs, and that in the meantime all the proceedings might be stayed.

The Applicants filed affidavits denying that they had acted as solicitors for the Plaintiff or the Defendants other than *Genese*, or that they had ever seen them prior to the preparation of the charge. They denied all knowledge of the will or of its effect, and they stated that they had made out their bill of costs for the Defendant *Genese*, and that the charge was not executed in their office, or in their presence, or before any one representing their firm. The affidavits, however, were not read on this application.

On the 19th of January, 1883, the summons was adjourned into Court, and heard before Mr. Justice *Kay*, when his Lordship ordered the action to be dismissed as against the Defendants Messrs. *Beyfus*, and that their names should be struck out of the proceedings.

The Plaintiff appealed. The appeal was heard on the 19th of February, 1884.

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Beddall (*Hastings*, Q.C., with him), for the Appellant:—

The order dismissing the action as against these Defendants was improper—a serious case is made against them in that acting as solicitors for the Plaintiff they did not explain the effect of the document to him, a clear case of negligence is made against them.

[COTTON, L.J.:—Negligence in the absence of damage is not actionable, and here no damage is alleged.

EARL OF SELBORNE, L.C.:—If any cause of action is alleged against the solicitors it is disconnected with that against the other Defendants.]

That is no misjoinder now. Order XVIII., rule 1, authorizes the joinder in one action of several causes of action, and by Order XVI., rule 4, the joinder of several persons as defendants against whom different relief is sought is allowed. The two rules must be read together. Any inconvenience arising from such joinder can be obviated by an application under Order XVIII., rule 8. Under that order the Defendants should have applied here and not under Order XXV., rule 4. All the Defendants were engaged in one and the same series of transactions, although in different degrees. The solicitors are properly joined, on the authority of *Huguenin* v. *Baseley* (1), for the purpose of making them pay costs; as Lord *Eldon* points out, it is not sufficient for them to obey instructions given them by their client if they are such as they ought not to have allowed to take effect (2).

Order XXV., rule 4, was not intended merely to restore in another form demurrers which have been abolished by rule 1 of that Order, and it has been so held by Mr. Justice *Field* in *Parsons* v. *Burton* (Dec. 6, 1883), and by Mr. Justice *Chitty* in *Batthyany* v. *Walford* (Feb. 9, 1884). Its real object was to enable the Court to dismiss clearly frivolous proceedings, *e.g.*, actions against Judges and other officials in the performance of their official duties. Where deeds and other instruments are impeached for fraud, solicitors engaged in their preparation are properly made parties for the purpose of discovery. In *Beadles* v. *Burch* (3), *Shadwell*, V.C., repeats with approval a statement

(1) 14 Ves. 273. (2) 14 Ves. 301. (3) 10 Sim. 332.

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of the practice from Lord *Redesdale's* Treatise on Pleading, which shews that a solicitor made a defendant under such circumstances cannot demur on the ground of his not having an interest in the matter in question in the action. Here the claim alleges that the Defendants (which would include the solicitors) knew of the effect of the charges. There is no need now to ask distinctly for discovery. The present Order XX., rule 6, omits the words which were in Order XIX., rule 8, of the Rules of 1875, for which it is substituted.

[EARL OF SELBORNE, L.C., referred to *Attwood* v. *Small* (1).]

Kekewich, Q.C., and *E. Ford*, for the Respondents, were not called upon.

EARL OF SELBORNE, L.C.:—

We both think that the order appealed from is right. It is important that the purpose and intention of Order XXV. of the Rules of 1883 should be well understood. Demurrers under the old practice served a double office. In many cases they gave opportunity for a sort of rehearsal, or preliminary argument of the case, and did not lead to any final decision; and in that class of cases they only produced costs and deserved to be discouraged. But in another class of cases they were most proper and useful, when the whole matter could be brought at once to a point and disposed of; and I should be sorry to have been a party to any change which would practically deprive a defendant of the means of obtaining a summary decision of the question at issue when it is fit and proper so to be decided.

Demurrers are in form abolished; but Order XXV. takes notice of three forms, in which the object of demurrers may be obtained, first, by raising on the pleadings a question of law, so that the parties may have it decided quickly; secondly, by raising the question on a pleading whether it discloses any reasonable cause of action or answer, in which case the Court may order the pleading to be struck out, not necessarily disposing of the whole action; and thirdly, in case an action or defence is shewn by the pleadings to be frivolous and vexatious, then the Court or a Judge can dismiss

(1) 6 Cl. & F. 232.

the whole action, or order it to be stayed, or judgment to be entered accordingly, as may be just. That is the case said to exist here, and the only question is whether it does exist. Whether that rule may give a wider power to the Court in a case which is obviously vexatious than it had under the old practice is a question which we need not now consider, because it appears to me that this statement of claim would always (as against these Defendants) have been demurrable. First, because it improperly joins the solicitors with other parties when the claim raises only an independent cause of action as regards them, (assuming it to be a cause of action at all,) which has nothing to do with the cause of action against the others except in so far as it is historically connected with it as one matter in the transaction. The case raised against the other Defendants is a case of fraud in procuring promissory notes and a charge, and the allegation of the fraud does not suggest that to that fraud the solicitors either directly or indirectly were parties. To the relief sought against the other Defendants, it is clear that the solicitors are mere strangers. If the statement of claim did disclose any cause of action against the solicitors, it would have nothing to do with the case against the other Defendants. It is merely this, that, in some way or other, the solicitors, having acted for all parties in the transaction in the claim referred to, did not do their duty towards the Plaintiff. That claim has nothing to do with the other parties, nor have the other parties anything to do with that particular claim.

To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected in the way I have suggested) is not contemplated by Order XVIII., r. 1, which authorizes the joinder, not of several actions against distinct persons, but of several causes of action.

But the next question is, whether any reasonable cause of action appears to be alleged on this statement of claim against the solicitors. The allegations against them are, 1. That they acted as solicitors for all parties; 2. That they prepared a charge which the other Defendants are said to have advised the Plaintiff to execute; 3. That the charge, although read over to the Plaintiff,

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was never explained to him, and that he executed it without comprehending its effect. I doubt whether even if the statement of claim had gone on to allege that the Plaintiff had suffered some loss or damage, that standing alone would have been an adequate allegation of failure of duty such as to shew a cause of action. It might be easily expanded, no doubt, so as to constitute a cause of action, but if the sense on the face of the statement is clear, it must not be expanded beyond what the words really mean. There is no allegation here that the thing which ought to have been explained to the Plaintiff was the risk of forfeiture under the will, the statement is merely that the charge was not explained. To make any omission a cause of action, damage resulting from it should be shewn ; but the whole ground of action of the Plaintiff against the other Defendants is that he is not bound by the deed, and therefore the whole statement of claim, so far from alleging that he has suffered damage, alleges that he has done nothing which can cause forfeiture. There is no question of nonfeasance on the part of the solicitor. Misfeasance has not been suggested.

There follows the very vague statements in par. 10 of the claim that all the Defendants knew the effect of the charge under the will, without any statement that the Plaintiff was ignorant of it. There is one other allegation against the solicitors, and that is, that they have charged the Plaintiff £23 for preparing the charge. Either the Plaintiff has a right to delivery of the bill of costs and taxation or not. It is true that he asks by his statement of claim for delivery of his bill and taxation, but an action should not be brought for that purpose.

No action can be justified, where the money has been paid, merely for the sake of obtaining delivery and taxation of the bill.

It is true he asks for damages generally, but for what? none are alleged.

It is said that for the purposes of discovery the solicitors may be made parties. I adhere to what was said by myself in 1874 in *Barnes* v. *Addy* (1), which was then approved by Lord Justice *James*. "I repeat what I said during the argument, that I have been under the impression, and I hope the impression will go

(1) Law Rep. 9 Ch. 244, 255.

abroad, that of late years the Court has set its face against making solicitors or others, who are properly witnesses, and who are not chargeable with any part of the relief prayed, parties to suits with the view of charging them with costs alone. I know no principle on which they can be charged and made parties for that purpose, unless other and further relief might also be given against them." It is obvious that if solicitors cannot be made parties to pay costs, *à fortiori* they cannot be made parties for the mere purpose of making discovery.

The only question is whether the action is on the face of the pleadings frivolous and vexatious. I have no hesitation in saying that an action against solicitors without shewing any case except by alleging that they acted as solicitors in a transaction in which the Plaintiff seeks relief against other parties is vexatious, and it was rightly dismissed against them. The appeal will be dismissed with costs.

COTTON, L.J. :—

I am of the same opinion. Order XXV., r. 4, clearly refers to a case where, according to the old practice, a claim would be demurrable. What is this but demurrable, if the statement of claim discloses no reasonable cause of action, that is, if one Defendant or all the Defendants can shew that there is no cause of action disclosed on the statement of claim against him or them?

But it goes further than an order allowing a demurrer went, for it says the Court may order any pleadings to be struck out on the ground that it discloses no cause of action, and may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just. I will not repeat what the Lord Chancellor has said in reference to this statement of claim, but I concur that it shews against these Defendants no reasonable cause of action, though it may possibly shew that in a particular case they were guilty of negligence, but that of itself in the absence of any damage is no cause of action. As regards the bill of costs, the Plaintiff could have obtained under the *Solicitors Act* by summary proceedings delivery of the bill and taxation. This statement is not only demurrable, but I agree with the Lord Chancellor that to make a solicitor a party to an action

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without seeking any relief against him except to make him pay costs or give discovery is vexatious. If a solicitor is guilty of negligence, he can be attacked in an action for negligence. If guilty of worse conduct there are other steps that can be taken against him. But I will not encourage parties to bring a solicitor before the Court in an action such as the present.

Solicitors for Appellant: *Stevens, Bawtree, & Stevens.*
Solicitor for Respondents: *J. Balfour Allan.*

M. W.

C. A. 1884 *Feb.* 21.

In re CHANCELLOR. CHANCELLOR *v.* BROWN.

[1880 C. 0574.]

Will—Construction—Trust for Sale—Power to postpone Sale—Direction as to interim Profits—Profits arising from Business pending Sale—Capital or Income.

A testator devised and bequeathed his real and personal estate upon usual trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and, after her death, for his children. The will contained the usual power to postpone the sale and conversion of the real and personal estate, and the usual direction that until sale and conversion the rents, profits, and income thereof should be paid and applied to the same persons and in the same manner as the income of the trust estate.

The will contained no reference whatever to the business of the testator, which comprised the bulk of his estate. The executors carried on the business for nearly two years with a view to its sale as a going concern, and the question arose whether the profits of the business during that period were to be treated as capital or income:—

Held, that the executors had power to carry on the business for a reasonable period with a view to its sale as a going concern; and that, as the testator had expressly directed that the profits of his personal estate until conversion were to be treated as income, the general rule laid down in *Howe* v. *Earl of Dartmouth* (1) did not apply, and therefore the widow was entitled to the profits of the business.

Brown v. *Gellatly* (2) and *Kirkman* v. *Booth* (3) distinguished.

GEORGE CHANCELLOR, by his will, dated the 15th of September, 1876, devised and bequeathed all his real and personal

(1) 7 Ves. 137. (2) Law Rep. 2 Ch. 751.
(3) 11 Beav. 279.

estate to trustees upon usual trusts to sell and convert the same into money and to invest the net residue thereof, and to pay the income thereof to his wife for life, and after her death to hold the trust estate upon trusts for his children; and the testator declared that his trustees or trustee might postpone the sale and conversion of his real and personal estate or any part thereof for so long as they or he might think fit, and that "the rents, profits and income to accrue from and after my decease of and from such part of my real and personal estate as shall for the time being remain unsold and unconverted shall, after payment thereout of all incidental expenses and outgoings, be paid and applied to the person or persons and in the manner to whom and in which the income of the moneys produced by such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had been actually made."

The testator died on the 2nd of February, 1878, and at the time of his death was carrying on business as a wholesale provision merchant, and his executors carried on the business at a profit until the 31st of December, 1879, when they sold it as a going concern.

The testator's business and the freehold premises on which it was carried on were of considerable value, and comprised the bulk of his estate.

This action was instituted in 1880 to administer the estate, and on the 17th of June, 1880, *Jessel*, M.R., on a summons in Chambers, expressed an opinion that according to the true construction of the will the net profits arising from the business whilst the executors were carrying it on were within the general rule established by *Howe* v. *Earl of Dartmouth* (1), and were to be treated as capital, and that the widow was only entitled to interest thereon at the rate of £4 per cent. per annum.

A notice of motion to discharge this order was duly given, but was not proceeded with until the 5th of March, 1883, when it came before Mr. Justice *Chitty*, who, considering himself in great measure bound by the opinion expressed by the late Master of the Rolls, declined to make any order.

The widow appealed.

(1) 7 Ves. 137.

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In re CHANCELLOR. CHANCELLOR v. BROWN.

Ince, Q.C., and *Willis Bund*, for the Appellant:—

There is no direct authority on this question, but the principle of *Howe* v. *Earl of Dartmouth* (1) has been applied to this case in its severest form. The business and the business premises comprise almost entirely the whole estate. It is "personal estate" and the profits arising from it are "profits and income" of personal estate; and, although the will contains no express mention of the business, the testator must have contemplated it being carried on by his executors. It is said that the *dictum* of Lord *Langdale*, quoted in *Kirkman* v. *Booth* (2), is against us, but we submit that the executors could not have postponed the sale of the business without carrying it on. In *Lean* v. *Lean* (3) it was held that a direction to postpone the sale of a business justified the executors in carrying it on; and in *Green* v. *Britten* (4) a bare direction not to sell was held to entitle tenant for life to the rents until a sale. The nearest case to this, however, on the words, is *In re Norrington* (5). We submit that on the true construction of this will the testator intended the tenant for life to have the net profits of this business as income.

E. T. Holland, for the infant children:—

I agree that there is no case in which the same clause occurs that is used in this will, but the principle of the cases shews that this profit must be treated as capital, not income. I rest my contention upon the particular nature of this property.

[FRY, L.J.:—Must you not assume under this postponement clause an implied power to carry on the business, and, if so, will not the profits in like manner go to the tenant for life?]

Assuming the implied power, there are cases which shew that the principle of *Howe* v. *Earl of Dartmouth* must still apply. In *Brown* v. *Gellatly* (6) the testator's ships were not specifically mentioned, and the profits arising from the ships were held to be capital, not income; and in *Meyer* v. *Simonsen* (7) the same rule

(1) 7 Ves. 137.
(2) 11 Beav. 273, 280.
(3) 23 W. R. 484.
(4) 1 D. J. & S. 649.
(5) 13 Ch. D. 654.
(6) Law Rep. 2 Ch. 751.
(7) 5 Dr. & Sm. 723.

was applied to the profits of the testator's share in a business, which was not mentioned in his will.

[COTTON, L.J.:—In both these cases there was no direction that the profits of the estate, pending conversion, were to be paid to the tenant for life.]

I admit that is so, but *Kirkman* v. *Booth* (1) is a more direct authority.

[COTTON, L.J.:—In that case the executors carried on the business for thirteen years to make profits, not with a view to a sale within a reasonable time as a going concern. Do you suggest that the executors here have carried on this business for an unreasonable period?]

No; but I submit there is no sufficient intention expressed on this will that the tenant for life is to take *in specie* the profits arising from this particular property: *Re Llewellyn's Trust* (2); *Caldecott* v. *Caldecott* (3); *Taylor* v. *Clark* (4).

Romer, Q.C., and *Williams*, for the executors.

No reply was called for.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*, who followed, apparently without exercising any judgment of his own, the decision in Chambers of the late Master of the Rolls, who declared that the profits of this business were capital, and that the tenant for life was only entitled to 4 per cent. interest thereon. Now this is the will of a trader, and undoubtedly the general rule is that where property is invested on a security of a wasting character that must be realised, or, if not realised immediately, then the tenant for life is only entitled to interest on the realised value. But a testator can say what he likes, and if he chooses to say that the investment may be continued, or the sale of it may be postponed, and that the profits arising from such security in

(1) 11 Beav. 273.
(2) 29 Beav. 171.
(3) 1 Y. & C. Ch. 312.
(4) 1 Hare, 161.

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the meantime shall be paid to the tenant for life, he can do so. The question is whether the testator has said so. Here the testator has given his real and personal estate to trustees upon trust to sell and convert, and to invest the proceeds, and to pay the income to his wife during her life, or until she shall marry again. Then he empowers his trustees to postpone the sale and conversion of his real and personal estate. [His Lordship read the clause, and continued:—] Now, in the first place, that clause must apply to this business, which was the greater part of his personal estate. That being so, the trustees had power to postpone the sale of the business, not for the purpose of carrying it on to make profits, but to carry it on for such a reasonable period as would enable them to sell it profitably as a going concern. Here it is not suggested that the trustees have acted improperly. Then is the widow to have the profits? The testator says, "the rents, profits, and income which shall accrue after my death from such part of my real and personal estate as shall for the time being remain unsold shall, after payment thereout of all incidental expenses and outgoings, be paid to the person or persons to whom the income would for the time being be paid if such sale had not actually been made." Now it is quite true that the discretionary powers exercised by trustees are not to affect the rights of beneficiaries, but when a testator himself expressly directs what shall be done with the income accruing during the period the sale is postponed, the general rule does not apply, and we are at liberty to give effect to the plainly expressed intention of the testator. If there had been no such direction here, no doubt the general rule would have applied, and the widow would only have been entitled to interest at 4 per cent. on the income of the business. But here the testator has said what she is to have if the trustees exercise their discretion. In my opinion, therefore, without impugning any of the authorities that have been referred to, there is in this will an implied authority to the trustee to carry on the business, and the testator has said how the profits of the business pending a sale are to be paid and applied. I am, therefore, of opinion that the net profits arising from this business are income, and are payable to the widow.

BOWEN, L.J.:—

I am of the same opinion. The general rule is beyond controversy, and the only question is whether this testator has not expressly directed what shall be done with the profits of the business during the postponement of the sale. It is a simple matter of interpretation of the words of the will. I think he has.

FRY, L.J.:—

I am of the same opinion. The terms of this will seem to amount to a direction by the testator that under certain circumstances his business is to be continued, and that the profits arising from it until sale are to be paid to his wife. The general rule applicable to these cases is undoubted. The only question is whether there is in this will an express direction that takes the case out of the rule. The testator has empowered his trustee to postpone the sale and conversion of his personal estate, and this business was the principal portion of his estate. It would be a strong thing, therefore, to say that the sale of his business was not contemplated by the testator, and could not be postponed by his trustees for a reasonable period. To postpone the sale of the business, therefore, involves the continuing it in the meantime. I think, therefore, that the testator has directed that his business shall be carried on until it is sold, and that the profits of it until sale shall be paid to the person entitled to the income of his trust estate. My own belief is that by this clause the testator intended to deal with the profits of his business until it was sold.

Solicitors: *W. H. Withall & Co.*; *Courtenay, Croome & Son.*

M. W.

C. A.
1883
PEARSON, J.
Dec. 1.
C. A.
1884
Feb 2, 6.

In re RIVIÈRE'S TRADE-MARK.

Trade-marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *s.* 5 — *Person "aggrieved"—Person not carrying on Business in England.*

R. & Co. registered a trade-mark for brandy in *England*. *M. & Co.*, who carried on business at *Madras*, but neither carried it on nor intended to carry it on in *England*, applied to rectify the register by striking out the name of *R. & Co.* and substituting that of *M. & Co.* as owners of the trade-mark, alleging that they, *M. & Co.*, were the owners of the trade-mark, and had instructed *R. & Co.* to register it in the name of *M. & Co.*, instead of which *R. & Co.* had registered it in their own name.

Held, by *Pearson*, J., that as *M. & Co.* neither used nor intended to use the trade-mark in *England*, they were not entitled to registration of it in *England*, and could not be persons aggrieved within the meaning of the *Trade-marks Act*, 1875, sect. 5, and that on this ground the application must be refused without entering on the merits.

Held, on appeal, that assuming *M. & Co.* to have no right to register the trade-mark in *England*, it did not follow as a necessary consequence that they could not be aggrieved by its being registered here in the name of another person, and that the case must be dealt with on the merits.

Whether in order to entitle a person to have a trade-mark registered, he must be carrying on or intending to carry on business in *England*, *quære*.

THIS was an application by *McDowell & Co.* to rectify the register of trade-marks by striking out the name of *Rivière & Co.* as owners of a certain trade-mark registered in their names on the 4th of September, 1879, and substituting the name of *McDowell & Co.* as the owners thereof.

The case made by the applicants was that they carried on business as wine, spirit and general merchants at *Madras*. That in 1875 they became desirous of introducing a brandy with a distinctive mark of their firm and adopted a red Maltese cross. That *Rivière & Co.* of *Cognac* and *London* supplied *McDowell & Co.* with bottled brandy labelled with the above mark. That *McDowell & Co.* extensively advertised and sold in *Madras* brandy thus labelled, and that the trade-mark became a valuable one. That owing to attempts made to infringe it they became desirous to have it registered in *England* and *France*, and in 1879 requested *Rivière & Co.* to get it registered in both countries. That after 1880, *McDowell & Co.* ceased to obtain

brandy from *Rivière & Co.*, and obtained it from other shippers, continuing to sell it under the red cross mark. That in August, 1882, *Rivière & Co.* commenced an action against them in *Madras* to restrain them from using the red cross trade-mark, which suit was still pending. That till June, 1882, *McDowell & Co.* always believed that the trade-mark had been registered in their name, but that about that time one of the partners on coming to *England* found that it had been registered in the name of *Rivière & Co.*

The case made by *Rivière & Co.* in opposition was, that from the 28th of January, 1873, they had used a red Maltese cross as a trade-mark on brandies exported by them to four of their customers, and that after 1875 it was used on the brandies exported to *McDowell & Co.*, under an arrangement that *Rivière & Co.* would not use this trade-mark on any other brandies than those supplied to *McDowell & Co.*, so long as the latter firm got their whole supply of brandy from *Rivière & Co.* That *Rivière & Co.* registered this trade-mark as theirs in *France* on the 20th of April, 1875, and afterwards registered it in *England* in their own names on the 4th of September, 1879. That such registration was not an infringement of any right of *McDowell & Co.*, that the latter firm had never had any place of business in *England* nor had ever used the trade-mark in *England*, and had not until recently used it in *India* except in connection with brandies consigned to them by *Rivière & Co.*

The application came on for hearing before Mr. Justice *Pearson* on the 1st of December, 1883.

Willis Bund, in support of the motion.

Cozens-Hardy, Q.C., and *Bradford*, on behalf of *Rivière & Co.*, raised a preliminary objection:—

The Applicants, *McDowell & Co.*, are not entitled to have the register altered. They are not persons aggrieved within the meaning of the 5th section of the *Trade-marks Act*, 1875 (38 & 39 Vict. c. 91), and the 33rd rule made in pursuance thereof. The Applicants are carrying on business at *Madras*. They have never carried on business in *England*, and they have never used

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the trade-mark in *England*. The course of business has been this: *Rivière & Co.* have consigned brandy of a particular kind to *McDowell & Co.* in *Madras* with a certain mark on it, in respect of which the registration has been effected. *McDowell & Co.* seek to have the mark removed from the register and to have themselves put on; but as they have only used the mark in *Madras* they are not persons aggrieved within the meaning of the Act. The point came before this Court lately in *In re Ralph's Trade-mark* (1), and it has come before Mr. Justice *Chitty* in *In re Munch* (Nov. 14, 1883). They may have a good trade-mark in *Madras*, but that is now a subject of litigation between us in *Madras*.

In re Munch is a decision that a mere foreign user does not bring a person within the purview of the Act, and he cannot be a person aggrieved, because he never could have the trade-mark registered in *England*.

[*Sebastian* on Trade-Marks (2) was cited.]

Willis Bund :—

The case cited does not apply here. That was a case upon what is known as the three-mark rule—that if three persons had *bonâ fide* used the same old mark before 1875, they were all entitled to come on the register. It was not an application under the 5th section of the Act. The only question with regard to user there, was whether, where a man had used a trade-mark abroad and another person had used it in this country, the man abroad could say that his user abroad was the same as the user in this country so as to entitle him to go on the register.

The words of the section under which I move are, "any person aggrieved may apply" in the prescribed manner. The facts are, that *Rivière & Co.* were agents in *England* for *McDowell & Co.*, of *Madras*. *McDowell & Co.* instructed *Rivière & Co.* to register this trade-mark for them, and instead of doing so they registered the trade-mark in their own name. Therefore I say we are persons aggrieved; because by doing so they committed a fraud on us. We have not used the trade-mark in *England*, nor is that necessary under the Trade-mark Rules. There is no necessity

(1) 25 Ch. D. 194. (2) Page 233.

for the person registered to be a British subject at all. We are, therefore, entitled to register here. The Act does not say that the person who registers must be a person trading in *England*, and there are many persons trading in *America*, *France*, and all over the world, who come here and register their trade-marks. If the goods of a foreigner can be sent to *England*, he may register here to prevent any infringement of his trade-mark, otherwise a door would be opened to fraud. If a foreigner having no business in *England* were not able to register in this country, his mark could be pirated, and the foreigner would have no means of preventing the fraud. The injury to us would be this, that the goods of the man who is trading in *England* with our trade-mark, might be sent to *India* and interfere with our trade. We might be able to restrain them in *India* without the registration here, but if we are registered here, we could restrain the goods before they got to *India*. Unless our trade-mark is registered here, we should be prevented by the 1st section of the *Trade-Marks Act* from instituting any proceedings to prevent or to recover damages for infringement of any trade-mark.

PEARSON, J. —

Upon the materials before me, I come to the conclusion that the preliminary objection must prevail. I think the object of the registration of trade-marks here is to protect trade-marks which are in use, and which are intended to be used continuously, in this country. I am of opinion that it was not the intention of the Legislature to allow all the world to come here and register any trade-mark they might devise, which trade-marks never had been and were not at the time of such registration either in use or intended to be in use in this country.

With regard to the difficulty which is suggested, namely, that if there be a trade-mark in use and properly in use in *India*, unless that trade-mark is also registered in this country, the person possessing properly that trade-mark in *India*, and finding himself imposed upon and defrauded by persons improperly dealing with that trade-mark for the purpose of interfering with his trade in *India*, would not be protected because it was not registered in this country; I differ entirely from that suggestion. I

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conceive that that person would be entitled to protection independently of the *Trade-marks Act*. He would be entitled on the ground of fraud to the protection which every person in this country is entitled to on the ground of fraud. I may refer to the case of *Emperor of Austria* v. *Day* (1); nobody could have said because the Emperor of *Austria* was not coining money in this country, he would not be protected against a person who fraudulently coined (if I may use that word where it was paper which was printed) Austrian money in this country, for the purpose of flooding the Austrian empire with paper, which was a very gross deception.

I think this application cannot be made under the *Trade-marks Act*, and I must therefore refuse this motion with costs, which will include the costs of the Registrar. I do not mean to decide that the applicants may not be entitled to the relief they ask in another form.

T. W. G.

C. A. *McDowell & Co.* appealed, and the appeal was heard on the 2nd and 6th of February, 1884.

Willis Bund, for the Appellants:—

Mr. Justice *Pearson* disposed of the matter on the preliminary objection that the Appellant was not a "person aggrieved." But it is not necessary that a person who applies to have a trade-mark removed from the register should be one who would be himself entitled to have a trade-mark registered. The "person aggrieved" in the *Trade-Marks Act*, 1875, and the 33rd rule of the Trade-Marks Rules, means any person who is injured by the registration complained of: *In re Ralph's Trade-mark* (2). The logical result of Mr. Justice *Pearson's* judgment would be that no foreigner could bring an action for an infringement of a trade-mark, because he cannot register his trade-mark; for the same arguments that apply to an application under this rule apply to an action at law.

Cozens-Hardy, Q.C., and *Bradford*, for *Rivière & Co.*:—

The applicants are not parties aggrieved within the meaning of the 5th section of the Act.

(1) 3 D. F. & J. 217.

(2) 25 Ch. D. 194.

[EARL OF SELBORNE, L.C. :—There is a difficulty in dealing with this matter without looking into all the grounds on which the Appellants may be aggrieved. We think it is undesirable to dispose of it on this preliminary objection. It will be better to dispose of the whole matter on the evidence. The case must stand over for that purpose.

Willis Bund suggested that in that case the appeal would be from a final order, and must be heard by three Judges. The Court determined that for this reason it would be safest only to deal with the preliminary objection.]

There can only be a right to a trade-mark in connection with a business: *In re Ralph's Trade-mark* (1); and a right to an English trade-mark must be in connection with a business in *England*: *In re Munch.* Till a business is carried on there can be no right to a trade-mark: *Maxwell* v. *Hogg* (2). *Clark* v. *Freeman* (3) shews that unless a person can be damaged in his business he has no ground of complaint.

[EARL OF SELBORNE, L.C. :—That case has seldom been cited but to be disapproved. Could not a professional man be injured in his profession by having his name associated with a quack medicine?]

"Aggrieved" must be taken in the legal sense: a moral ground of complaint is not enough. The applicants admit that they have never traded within the jurisdiction, and have no intention of doing so; they cannot, therefore, sustain any legal damage by the registration of a trade-mark here.

EARL OF SELBORNE, L.C. :—

The sole question which we have now to determine is whether the learned Judge below was right in refusing an application by Messrs. *McDowell & Co.*, of *Madras*, to expunge the registration of a certain trade-mark, on the ground that they were not entitled in law to make the application, and that, therefore, he could not go into the question whether upon the merits they were aggrieved.

(1) 25 Ch. D. 194. (2) Law Rep. 2 Ch. 307.
(3) 11 Beav. 112.

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Earl of Selborne, L.C.

The first observation which I have to make is, that I do not find on the face of the Act of Parliament itself any particular limitation of the sense in which the word "aggrieved" is to be understood, when a person alleging himself to be aggrieved undertakes to bring the case within any one of the conditions on which a right to apply to rectify the register is given to a person aggrieved. Of course if it could be shewn *à priori*, that in point of law persons in a certain situation could not be aggrieved, then the conclusion would be right, that the Court must refuse to hear them on the merits; but, unless that can be demonstrated, I find nothing in the Act of Parliament which limits and defines the kind of grievance which may entitle a man to apply. I entirely agree with what has been said, that it must be a legal grievance: it must not be a "*stet pro ratione voluntas*"; the applicant must not come merely saying, "I do not like this thing to be done;" it must be shewn that it tends to his injury or to his damage in the legal sense of that word. If he shews damage, and also shews one of three things, that the name entered on the register is that of a person who is not for the time being entitled to the exclusive use of the trade-mark in accordance with the Act or otherwise in accordance with law; or, secondly, that he is himself an applicant for registration, and is entitled to the exclusive use of the trade-mark in accordance with the Act or in accordance with law, he can object. In this second case it is not disputed that he must necessarily have a grievance; but the argument is that unless he can shew that he is himself entitled to the trade-mark he has no grievance, and that argument, I confess, I do not follow. The third case is where any mark is registered as a trade-mark which is not authorized to be registered under the Act.

I do not see any reason to take exception to what has been said as to the nature of a trade-mark, in the sense in which it is dealt with by this Act, or as the subject of protection by law. Doubtless under this Act it must be connected with some goods or classes of goods. We will assume that it must be connected with some business carried on, or at all events to be carried on directly or indirectly in those goods or classes of goods—I will go further and assume, but I do not decide, that there must be evidence of a business being so carried on, or intended to be so carried on, in

some way or other within the jurisdiction, in order to entitle a party to register a mark as a trade-mark. I do not decide that, but for argument's sake I assume that to be so, as the learned Judge seems to have thought. But then is it quite impossible that a person not carrying on within the jurisdiction a business in respect of which he is himself entitled to register a trade-mark, should be aggrieved by some other person proposing to register something as a trade-mark? It is perfectly clear from the terms of the 5th section that persons may be aggrieved by the registration of something as a trade-mark which is not authorized to be registered under the Act, as for instance, something which is *communis juris*, as in the case just now mentioned, a common mark used by a great many people, and which ought not to be registered at all. It is plain then that a person may be aggrieved though he is not entitled to register in respect of that mark of the registration of which he complains; and as it cannot be a necessary condition that he should be entitled to register in respect of that mark, I do not know how it can be shewn that it is a necessary condition that he should be entitled to register in respect of some other mark. The Court is asked here to say, as a matter of law, that the present applicants cannot have a grievance, and the Judge in the Court below has so said. Now, with all respect to the very learned and careful Judge who decided this case, I cannot agree with that view. It is to my mind a matter of fact to be decided on the evidence, and not to be determined *à priori* as a matter of law. We were, therefore, very desirous to hear the case upon the merits, if we could satisfy ourselves that we had clear jurisdiction to do so; for it might turn out when we were in possession of the facts that we should find no grievance to exist; but as we are not clear that the case can be heard on the merits before two Judges, we only overrule the preliminary objection, and remit the matter to Mr. Justice *Pearson* to be decided on the merits.

To illustrate the view which I take, I will put a case which (though I would not give a conclusive opinion upon it without hearing argument) appears to me to raise a very strong *primâ facie* presumption of legal grievance. Suppose *Rivière & Co.* had proposed to register in this country as their trade-mark a brand with these words upon it: "*McDowell & Co., Madras*," could it

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be seriously said that that would not be a grievance, even though *McDowell & Co.* of *Madras* were not carrying on any business in this country either directly or by consignees? I would not decide that hypothetical case until I heard the argument, but most assuredly I should dissent from anybody who said, as a mere matter of law, that it must be determined *à priori* that the registering such a mark could not be a legal grievance to *McDowell & Co.*

COTTON, L.J.:—

I agree. It is unfortunate that we are not able to hear the merits of the case, and that the only question we can now consider and decide is this, whether the Appellants here are persons who are entitled to be heard in order to have the register rectified.

Mr. Justice *Pearson* decided this case, as far as I can gather from the printed note of his judgment, on this ground, that the applicants were persons who could not register because they were persons resident abroad carrying on business there, and not alleging that they intended in any way to carry on business in *England*, that therefore they could not register, and, as they could not register, they could not come and ask the Court to rectify the register by taking off the mark which had been put there by the Respondents. In my opinion that decision is erroneous. There is nothing in the Act to limit the right of application to persons who can register. The 5th section of the Act under which the application is made requires only that an application for any of the reasons there mentioned shall be by a person aggrieved. That is all that the statute requires. What the learned Judge has in fact decided is, that a person who carries on business abroad and does not intend to carry on business here is a person who cannot under any circumstances be aggrieved by the registration of a trade-mark by a person who carries on business in *England*. That it is not required by the Act that the person who applies as an aggrieved person should be one who can register the mark in question, is perfectly clear from the 5th section, because one of the grounds of the application by a person aggrieved is that that which has been registered is a thing which is incapable of being registered as a trade-mark, so that the person aggrieved there

cannot be one who can be substituted on the register in respect of that trade-mark.

Now undoubtedly the grievance must be a grievance which the law recognises as one in respect of which a party can complain in a Court of justice, and not a merely sentimental grievance; but is it possible for us to say *à priori* that, assuming (though I by no means decide) the applicant to be a person who, having regard to the business which he carries on and the place where he carries it on, cannot register that which the Respondents have registered, he cannot be aggrieved? Consider what the effect of the Act is. The registration of the trade-mark is *primâ facie* evidence that the person who has registered it is entitled to the use of that mark. Undoubtedly that means a mark used in his trade or business, and it may be in *England* only; but, even if he has that *primâ facie* right to that mark in *England* only, the registration may possibly prejudice a man who is carrying on business abroad, where the goods of the person registered and his own goods come into competition in the same market. It may possibly be so, and it must be remembered that after five years, unless the mark is one which is incapable of being registered, the register is conclusive evidence that the person registered as owner of it is entitled to it as his trade-mark. I can conceive many circumstances under which registration by a person carrying on business in *England* of that to which he is not entitled as his trade-mark, and which is the trade-mark of a person carrying on business not here but abroad, might be a substantial grievance to the person who is carrying on business abroad. I will not imagine cases, because I would not say anything which might appear to decide upon the result of an imaginary state of facts.

In my opinion the learned Judge was wrong in attempting shortly to put an end to this case by saying that Messrs. *McDowell & Co.* are persons who from the circumstances of the case, from the nature of their business, from the place where they live and carry it on, cannot be persons aggrieved by the registration of this trade-mark in *England*.

Solicitors for Appellants: *Paddison, Son, & Co.*
Solicitors for *Rivière & Co.*: *Wild, Browne, & Wild.*

H. C. J.

C. A.
1884
KAY, J.
Jan. 19.
C. A.
Feb. 11.

In re EVANS.
WELCH *v.* CHANNELL.

[1880 E. 1084.]

Guardian and Ward—Maintenance of Infants—Voucher of Items of Expenditure.

H. and *C.* were trustees and executors of a will, and guardians of the testator's daughters. The daughters during their infancy were maintained by *C.*, and *H.* allowed him to receive the income for that purpose. After they attained majority judgment was given for administration of the testator's estate, in which the usual accounts of the personal estate were directed, and an inquiry how and by whom each of the daughters was maintained during infancy, and what was proper to be allowed and to whom out of the income of her share for her maintenance and education. A dispute having arisen in taking the accounts and inquiry, *H.* applied for a declaration that the receipts by *C.* of the income of the shares of the daughters for maintenance were a good discharge to *H.*, and that *H.* was not to be called upon to produce vouchers in respect of the particular manner in which the income was applied. *Kay*, J., made an order expressing the opinion of the Court that the accounts of the trustees should be taken as directed by the judgment as between guardian and ward, and ordering *H.* to pay the costs of the application:—

Held, on appeal, that *H.*, as trustee, was not discharged by mere evidence of payment of the income to *C.*, his co-guardian, but that under the inquiry *H.* was not bound to vouch the items of expenditure; and if it was shewn that *C.* had properly maintained and educated the children, the sum proper for that purpose would be allowed against the balance found due on the account, without vouching the details of the application.

WILLIAM EVANS, by will dated the 25th of June, 1862, appointed his brother-in-law, *F. Channell*, *J. Quick*, since deceased, and *W. Hickman*, executors and trustees, and guardians of his infant children. He gave to them his personal estate upon trust for conversion, and directed them to hold the residue, after payment of his debts, funeral and testamentary expenses and legacies (including a legacy of £800 to his son), upon trust for his three daughters as tenants in common, settling the share of each upon trusts for herself and her children.

The testator died in May, 1863, leaving his daughters infants. The eldest attained twenty-one in November, 1871, and the

youngest in December, 1875. They all went to school, their holidays were spent with *Channell*, their uncle, and after leaving school they resided with him till August, 1877, when they all left his house.

The eldest daughter, who had married, commenced this action in 1880 for the administration of the estate, against *Channell* and *Hickman*. *Hickman*, by his defence, alleged that *Channell* had maintained and educated the daughters, and that *Hickman* and *Quick* had paid to *Channell*, or permitted him to receive, the income for their maintenance and education during their infancy, and submitted that they were justified in so doing, and that *Channell* had expended more than the income in maintenance and education, and he submitted that no detailed account of the application of the income could be called for.

On the 6th of December, 1881, judgment was given directing, 1. An account in the usual form of personal estate of the testator come to the hands of *Channell* and *Hickman*, or either of them, alone or jointly with *Quick*, the Plaintiff waiving any account against *Quick's* estate; and 13. An inquiry how and by whom each of the three daughters was maintained after the testator's decease and during her infancy, and what was proper to be allowed, and to whom, from and out of the income of her share of the testator's estate, for her maintenance, education, or advancement from the testator's death until she attained twenty-one.

Channell died some time after the judgment without having rendered an account of his receipts and payments.

The Chief Clerk's certificate was in draft, and under Order LV., rule 69, *Hickman* desired to take the opinion of the Judge on the questions set out in a note of the Chief Clerk, by which, after stating that in account No. 1 he disallowed all items of payment alleged to have been made by *Hickman* to *Channell* for the maintenance and education of the infant children, he stated the following questions:—

"1. The Defendant *Hickman* contends that so long as the Plaintiff and her sisters respectively resided with and were properly maintained and educated by the Defendant *Channell*, and were infants, the receipt by the same Defendant as one of the guardians of such infants of the income of their respective shares,

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was a sufficient discharge to the Defendant *Hickman* in respect of such income, and that he is not accountable for and should not be called upon to produce any vouchers in respect of the particular manner in which such income was applied, nor the detailed items of expenditure thereof." The other point related to the account of the income after the daughters respectively attained twenty-one.

The case was adjourned into Court, and was heard by Mr. Justice *Kay* on the 19th of January, 1884.

E. T. Holland, for *Hickman*:—

Where infants are residing with one of several guardians, who are also trustees, payment by one or more to a particular guardian is a sufficient discharge. Where infants have been living with a relative who is a guardian, the infants and the other guardian cannot go into every item of expenditure. If it be proved that the infants have been properly educated and maintained the Court will not, as against the guardian himself, require a particular and detailed account of the expenditure. The practice of the Court is shewn in the cases of *Hora* v. *Hora* (1), *Re Ponsonby* (2), and *Jodrell* v. *Jodrell* (3). There is no *onus* upon the guardian or trustee to prove that the actual income has been expended in the education and maintenance of the infants; and if he proves merely that the income, not being an unreasonable sum, has been paid to a guardian, and that by him the infants have been properly educated and maintained, that is a sufficient discharge in taking the accounts.

Hastings, Q.C., and *Badnall*, for the Plaintiff, were not called upon.

KAY, J.:—

There was a special direction given for an account on behalf of the infants, as against the guardians and trustees, and of course they must go into the question of each particular item of expen-

(1) 33 Beav. 88. (2) 3 D. & War. 27.
(3) 14 Beav. 397.

diture. The meaning of the order is: has or has not the income been properly expended or how much of it has been properly expended? Payment by trustees or a trustee to a particular guardian may absolve them or him, but it does not absolve the guardian, and where the infants require an account to be taken as against the guardian he must shew he has properly expended the moneys. The Court will require him to shew that he has properly maintained the infants. This account must be taken as an infant and guardian account, and the Chief Clerk will know perfectly well how to take it, and he will be quite right in requiring that all the items of expenditure be proved.

It is not enough to say that the income was paid to one of the trustees and guardians. If the surviving guardian had been only a trustee, perhaps the payments to the guardian deceased would have been a sufficient discharge, but it is not so, he being a guardian; for being a guardian he could not delegate his office to the other guardian; but he was bound to see that the income was properly applied. The surviving trustee is in error in supposing that if he shews that the income got into the hands of his co-guardian, and that the infants have been properly maintained he is discharged where an account like this has been directed. The Chief Clerk has to investigate whether the infants have been properly educated and maintained, and he can do that only by ascertaining how much of the income has been actually expended for those purposes. From the time when the infants attained majority the account will be taken as between them and their trustees, and if the accounts are wrongly taken there must be a motion to vary the certificate of the Chief Clerk. The application being quite unnecessary the summons must be dismissed with costs.

T. F. M.

The following order was drawn up:—

"The application of the Defendant *Hickman* that it might be declared" [here followed *Hickman's* contentions as set out in the Chief Clerk's note, and a statement as to the application being adjourned into Court and heard.] "The Court being of opinion that the accounts of the Defendants the trustees should be taken

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as directed by the said judgment as between guardian and ward doth not think fit to make any order upon the said application," except an order for *Hickman* to pay the costs of the adjournment into Court.

Hickman appealed from this order, and by his notice of appeal asked for directions "that the inquiry with reference to the maintenance, education, or advancement of the testator's three daughters until they respectively attained the age of twenty-one years, and also the account to be taken under the said judgment of the income of their respective shares paid to and received by the Defendant *Channell* so long as they respectively resided with him after attaining the age of twenty-one years may be taken in accordance with the contention of the Defendant *Hickman* set out in the note of the said Chief Clerk upon the following principles, *i.e.* [here followed *Hickman's* two contentions as set out in the Chief Clerk's note.]

The appeal came on to be heard on the 11th of February, 1884.

W. Pearson, Q.C., and *E. T. Holland*, for the Appellant:—

We contend that *Hickman* ought to be allowed in his account the income paid to *Channell* for the maintenance of the infants. The receipt of a guardian is a good discharge: 23 & 24 Vict. c. 145, s. 26. We applied to examine *Channell* to vouch the account which he made out of the application of the income, but he died before anything could be done. The children were maintained, and it is against all principle that nothing should be allowed which we cannot vouch item by item. The order which is appealed from leaves us in a most uncertain position, it refers to taking accounts as between guardian and ward as directed in the decree, but the decree does not direct any account in those terms, and they are terms not known to the law. The Chief Clerk required every item to be vouched, and Mr. Justice *Kay* upheld him. This it is submitted cannot be sustained; if the infants have been properly maintained a reasonable amount must be allowed though not vouched.

Hastings, Q.C., and *Chadwyck Healey*, *contrà*:—

As regards the payments to *Channell*, we do not dispute that

Channell's receipts would have been good discharges if he had been sole guardian; but as *Hickman* was one of the guardians he cannot discharge himself by allowing his co-guardian to receive the whole income, it was his own duty to see that it was properly applied. As regards the vouching the items we cannot dispute that if *Hickman* proves that the infants were properly maintained and educated a reasonable amount for those purposes must be allowed the trustee under inquiry 13 without his vouching the items of expenditure.

W. Pearson, in reply as to costs.

COTTON, L.J.:—

In this case a great deal of expense has been occasioned by misapprehensions on both sides. The decree directed the ordinary accounts against the Defendants, who were trustees and guardians, and an inquiry how and by whom each of the infants was maintained after the testator's decease, and what was proper to be allowed and to whom out of the income of her share of the testator's estate for her maintenance, education, or advancement till she attained twenty-one. That is not an account, but an inquiry for the purpose of ascertaining what, having regard to the position and income of these young ladies, was proper to be allowed for their maintenance and education, to be allowed, that is, to the executors out of the balance found due on the account. On proceeding in Chambers under the decree *Hickman* contended that as to the income received by him it was a sufficient discharge to shew that he paid it to *Channell* for the maintenance of the infants. In that I think he was wrong; he was not only a trustee but a co-guardian, and we cannot lay down that he could discharge himself by payment of the income to his co-guardian. To decide that, would be to hold that he could discharge himself from his duty as guardian to see that the infants were properly maintained. In my opinion, therefore, *Hickman* was wrong in his contention as to the mode of taking the account No. 1.

But under the inquiry No. 13, I think that it was competent to *Hickman* to shew that, though he was answerable under account No. 1 for the payments he had made to *Channell*, the sums so paid

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were applied in such a way that the Court would not call upon him to enter into the details of their application. Under that inquiry it would be enough to shew that the infants were properly maintained by *Channell*, and *Hickman* would then be allowed the amount which was found the proper amount to be allowed for their maintenance, without shewing the details of the expenditure. I think that the Chief Clerk here took a different view and considered that the details must be vouched. I think that he fell into an error owing to the attempt which *Hickman* had made to set up the payments to *Channell* as an absolute discharge. I think that the Chief Clerk would never have submitted these questions to the Judge unless he had been of opinion that *Hickman* must produce vouchers for *Channell's* application of the income. The matter went before the Judge, and an order was drawn up which, whatever the Judge meant, is not very happily expressed; it expresses his opinion that the account should be taken as between guardian and ward. I conceive that the Chief Clerk would take that to mean that he was right in requiring the details of expenditure to be vouched, and some of the expressions used by the Judge in the Court below favour the idea that vouchers were to be carried in. I think that having regard to these expressions we ought not to allow the order to remain as it at present stands, but ought to express an opinion in these terms—that under account No. 1, Mr. *Hickman*, as trustee, is not to be discharged by mere evidence of payment to *Channell*, his co-guardian, of the income of the infants respectively, and that under inquiry No. 13, the Defendant, Mr. *Hickman*, is not bound to go into evidence as to the items of expenditure by Mr. *Channell*, his co-guardian.

It is hardly necessary to add to what I have already said, that, under inquiry 13 it must be seen what was the position of these infants, and what was the proper sum to be allowed for their maintenance and education in a reasonable and proper manner, and whether Mr. *Channell* did maintain and educate them in a reasonable and proper manner. If he did so, then, in my opinion, whatever may be found a reasonable sum for the purpose ought to be allowed as against the balance under account No. 1 which has been found due from Mr. *Hickman*.

But then comes the question as to costs. I said during the argument (and I have not changed my opinion) that a great deal of this unfortunate litigation and expense has been occasioned by the efforts of Mr. *Hickman* to get more allowed in his discharge under account No. 1 than he was entitled to have allowed, and that may have caused a confusion in the mind of the Chief Clerk, and possibly in the mind also of the learned Judge, between inquiry 13 and account No. 1. I think it is to be gathered from the materials before us that the other side also contended for too much, and so misled the Chief Clerk as to inquiry No. 13. These considerations led me to suggest in the course of the argument that there should be no costs on either side. But a trustee is in this position, unless he misconducts himself he is entitled to be paid his costs, and though, in my opinion, Mr. *Hickman* did not behave in the best possible manner, and in some respects was wrong, I cannot say that in the contention he has raised he did anything which can be considered misconduct. In my opinion, therefore, the costs both here and in the Court below ought to be costs in the action.

LINDLEY, L.J.:—

I am of the same opinion.

I am satisfied, now that we have heard the matter out, that if this matter had gone back to Chambers where Mr. Justice *Kay* left it, Mr. *Hickman* would have been in a difficulty from which he ought to be relieved.

I am not satisfied that we are differing from Mr. Justice *Kay*. He used some expressions in his judgment which tend to shew that we do differ from him, but he also used other expressions which tend to shew that he meant the same thing as we do. But be that as it may, I feel satisfied that if the matter had gone back to Chambers as Mr. Justice *Kay* left it Mr. *Hickman* would have been prejudiced.

I take the same view as my brother *Cotton*. I think the whole of this unfortunate misunderstanding has arisen from confusing the account No. 1 and inquiry No. 13, and treating the inquiry as an account. Mr. *Hickman* has, I think, insisted upon more than he is entitled to in taking the account No. 1; and the

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Plaintiff appears to me to have contended for too much under the inquiry No. 13. I cannot say that Mr. *Hickman* was wrong in coming here to get out of the difficulty in which he was placed.

I thought at one time that the right order to make as to costs would be that each party should pay his own costs; but I agree with my brother *Cotton* that Mr. *Hickman* has not been guilty of any misconduct to deprive him of his costs, and I therefore agree with the way in which he has proposed to vary the order.

Solicitors for Plaintiff: *Sole, Turner, & Knight.*
Solicitors for *Hickman*: *J. & R. Gole.*

H. C. J.

C. A. 1884 *Feb.* 13.

GIBBINGS *v.* STRONG.

[1882 G. 1135.]

Judgment in Default of Pleading—Defence delivered after Time—Rules of Court, 1875, *Order* XXIX., *rr.* 10, 14—*Rules of Supreme Court*, 1883, *Order* XXVII., *rr.* 11, 15.

S. gave to *G.* a charge upon costs due from *B.* to *S.* *G.* brought his action against *S.* and *B.*, asking for an account and foreclosure against *S.*, and that *B.* might be ordered to pay the amount of the bill of costs, £359, into Court. The time for delivering defence was enlarged from the 1st of August to the 16th of August, 1882. No defence having been delivered, notice of motion for judgment was served on the 18th of November. On the 2nd of December *B.* took out a summons for leave to deliver defence, which was dismissed on the 6th. The defence which he proposed to put in alleged that there were other dealings between *B.* and *S.*, and that no substantial part of the bill of costs was due, and moreover that *B.* was going to have the bill taxed. On the 19th of February, 1883, the motion for judgment came on for hearing. The Court refused to look at the defence, and gave a judgment directing an account against *S.*, and ordering *B.* to bring the £359 into Court. *B.* appealed:—

Held, that on motion for judgment for want of defence, if a defence has been put in, though irregularly, the Court will not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done, and that in the present case the order for bringing the £359 into Court must be discharged, and an account directed of what was due from *B.* to *S.* in respect of the bill of costs.

THE statement of claim in this action, commenced on the 9th of May, 1882, alleged that the Defendant *Strong*, a solicitor, by

promissory note dated the 15th of January, 1881, promised to pay to the Plaintiff, three months after date, £355 16*s.* 8*d.*, and that by a memorandum of even date *Strong* charged the costs then due to him from the Defendant *Burbidge* with the payment of the sum secured by the promissory note. That notice was given to *Burbidge* on the 17th of August, 1881. That *Strong* signed and delivered to *Burbidge* more than a month before the commencement of this action, a bill of his costs amounting to £359 14*s.*, and that *Burbidge* refused to pay the bill of costs or any part thereof to the Plaintiff. The Plaintiff claimed an account and foreclosure against *Strong*, an injunction to restrain him from receiving the costs from *Burbidge*, and payment into Court by *Burbidge* of the £359 14*s.*, the amount of the bill of costs.

The time to deliver statement of defence expired on the 1st of August, 1882, and was enlarged till the 8th of August, and again till the 16th of August. No defence was delivered. On the 18th of November notice of motion for judgment was served, and the action was set down on the 20th.

On the 2nd of December *Burbidge* took out a summons for leave to deliver statement of defence. On the 6th of December the summons was dismissed by the Chief Clerk, and was not brought before the Judge.

The defence which *Burbidge* asked leave to deliver, and a copy of which was served along with the summons, was to the following effect:—

That the bill of costs contained unreasonable charges, and that *Burbidge* intended to have it taxed. That *Burbidge* had large business transactions with *Strong*, some of which were pending when notice of the charge was given, and he disputed the fact that any material part of the bill of costs was due. That *Burbidge* was not a proper party to the action, as he had never disputed the validity of the charge, and was ready to pay what was due to the Plaintiff by virtue of it as soon as the amount was properly ascertained. That the bill of costs was delivered to *Burbidge* at the instigation of the Plaintiff, and before it ought to have been delivered, having regard to the transactions between *Strong* and *Burbidge*.

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The action came on for trial before Mr. Justice *Fry* on the 19th of February, 1883. The Court refused to look at the defence, and gave a judgment directing an account against *Strong*, and ordering *Burbidge* to pay the £359 14*s.* into Court.

On the 10th of March, 1883, *Burbidge* served notice of appeal, after which he was compelled to pay the £359 14*s.* into Court. The appeal came on to be heard on the 13th of February, 1884.

Ribton, for the Appellant:—

Graves v. *Terry* (1) shews that a pleading delivered after time without leave is not necessarily a nullity, but the Court will have some regard to it. When a motion for judgment in default of pleading is made, the Court will not shut its eyes to anything which may enable it to do justice.

Hatfield Green, contrà:—

The case is one of gross and inexcusable delay in delivering a defence, and the Court cannot properly look at a defence leave to deliver which has been refused. The Appellant might have taken the opinion of the Judge, but he acquiesced in the refusal by the Chief Clerk. *Graves* v. *Terry* turned on the fact of a reply having been delivered before notice of motion for judgment had been given.

[EARL OF SELBORNE, L.C.:—Having regard to the fact, that after a judgment has been given for default of pleading, the Court can set it aside on terms, is the Court bound to shut its eyes to any material facts when the motion for judgment is heard?]

In the exercise of judicial discretion the Court would not set aside a judgment by default after such delay as occurred here.

EARL OF SELBORNE, L.C.:—

We are of opinion that the order directing payment of the £359 14*s.* into Court ought not to stand, and that there should be an account of what is due from *Burbidge* to *Strong*, as well as of what is due from *Strong* to the Plaintiff. When no defence has been put in, then, by Order XXIX., rule 10, of the Rules of 1875, the plaintiff may set down the action or motion for judgment,

(1) 9 Q. B. D. 170.

"and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to." This means that the Court is to exercise some judgment in the case: it does not necessarily follow the prayer, but gives the plaintiff the relief to which, on the allegations in his statement of claim, he appears to be entitled: and if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. If it were found to contain nothing, which, if proved, would be material by way of defence, the Court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the Court will not take the circuitous course of giving a judgment without regard to it, and obliging the defendant to apply, under rule 14, to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits. In the present case, if there had been no defence put in at all, and counsel had pointed out to the Court that the action was in the nature of a suit for foreclosure of a charge on costs due from a third party to the debtor, I doubt whether the Court would have assumed the amount of the costs to be finally settled. The case being *primâ facie* one for an account or taxation, I think the Court would treat it as such, though no defence had been put in, particularly when we find the statement of claim so constructed that while it alleges the whole sum to be due on the promissory note, and nothing to have been paid in respect of it, it still asks for an account as between the Plaintiff and *Strong*, and does not ask for a final judgment against *Burbidge* for the sum due for costs, but only payment into Court of the amount of the bill of costs. In these circumstances, I think that on his statement of claim the Plaintiff would not be entitled to an order against *Burbidge* on the footing that £359 14*s.* was certainly due from him, but only to an account of what was due from him to *Strong* in respect of the costs. In taking this account, no payments made by *Burbidge* to *Strong* in respect of the costs since the 17th of August, 1881, when notice of the Plaintiff's security was given to *Burbidge*, must be allowed.

LORD COLERIDGE, L.C.J.:—

I am of the same opinion.

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COTTON, L.J. :—

I am of the same opinion on all points. I think it is the duty of a Judge, when an action comes before him on motion for decree in default of pleading, to look at everything the knowledge of which may enable him to do justice between the parties. The Plaintiff was entitled to move under Order XXIX., rule 10, but, especially having regard to rule 14, I do not think that where a defence has actually been put in, rule 10 can be construed as obliging the Court to pay no attention to it, because it was put in after time and without leave.

Solicitors for Plaintiff: *Trinders & Romer.*
Solicitors for *Burbidge*: *George Davis, Son, & Co.*

H. C. J.

C. A. 1884 V.-C. B. *Jan.* 19. C. A. *Feb.* 19.

In re INDIAN ZOEDONE COMPANY.

Company—Voluntary Winding-up—Special Resolution requiring Confirmation—Resolution appointing Liquidator—Notice of proposed Resolution—Necessity for—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 67, 133, *sub-s.* 2, 141 [*Revised Ed. Statutes, vol. xiv., pp.* 217, 232, 233].

A resolution appointing a liquidator is operative only when there is an effective resolution to wind up.

Where therefore a special resolution to wind up voluntarily which requires confirmation, has been passed at the first meeting, although it is unobjectionable to pass at the same meeting a resolution appointing a liquidator, the latter resolution by itself can have no effect; and if at the subsequent meeting the latter is rejected it is immaterial that the principal resolution, *i.e.*, to wind up, has been confirmed—nor is it possible to fall back upon the resolution appointing a liquidator which was passed at the first meeting and treat it as binding.

The chairman of a general meeting has *primâ facie* authority to decide all incidental questions which arise at such meeting, and necessarily require decision at the time, and the entry by him in the minute book of the result of a poll, or of his decision of all such questions, although not conclusive, is *primâ facie* evidence of that result, or of the correctness of that decision, and the *onus* of displacing that evidence is thrown on those who impeach the entry.

Where the chairman at a confirmation meeting disallowed certain votes which had been given against the confirmation of a resolution passed at the first meeting appointing a liquidator, the effect of such disallowance being to confirm such resolution, and he made an entry in the minute book that such

resolution had been confirmed, the Court in the absence of evidence that the votes were improperly disallowed, declined to question the decision of the chairman. But, having regard to the unsatisfactory state of the evidence, the Court of Appeal in the interest of all parties by its own order confirmed the appointment of the liquidator.

THE *Indian Zoedone Company, Limited*, was registered in 1881.

The articles of association which were material to the present report were the following: Art. 40. "Seven days' notice at the least of every general meeting, specifying the place, the hour and the meeting, and in the case of an extraordinary general meeting the purpose for which it is to be held, shall be given in the *London Gazette*, or by written or printed notice sent to each shareholder."

Art. 53. "All appointments of proxies shall be in the form or to the effect following (that is to say),

I, the undersigned one of the members of the *Indian Zoedone Company, Limited*, do hereby appoint to be my proxy.

or in such other form as the directors shall from time to time appoint."

The company was unsuccessful, and on the 1st of September, 1883, the secretary sent round a printed notice announcing that an extraordinary general meeting of the shareholders of the company would be held on the 27th of September, at 12 o'clock, "for the purpose of considering the subjoined resolution." At the foot of the notice was a resolution "that the company be wound up voluntarily under the provisions of the *Companies Acts*, 1862 to 1880."

"Should the resolutions (*sic*) be passed by the requisite majority they will be submitted for confirmation to a second extraordinary general meeting which will be subsequently convened."

At the meeting held on the 27th of September the resolution to wind up voluntarily was duly passed; and at the same time a further resolution appointing a Mr. *Spain* liquidator.

The second meeting was held on the 15th of October. Notice of this meeting had been sent to each shareholder, the notice stating that the resolutions to wind up voluntarily and appointing Mr. *Spain* liquidator would be submitted to the meeting.

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The first resolution was confirmed. Upon the second resolution being submitted the chairman declared it also carried, but this was disputed, and a poll was demanded, which was fixed for the 18th of October.

The result of the polling as delivered to the chairman by persons who claimed to have been appointed scrutineers was as follows: for the resolution 16,965 votes, against 22,313, shewing a majority of 5348 votes against the resolution.

The chairman, however, disallowed 12,235 votes out of the 22,313, thus leaving a large majority in favour of the resolution, and the chairman entered the resolution in the minute book as carried.

The votes so disallowed purported to belong to the *Zoedone Company, Limited*, which had given a proxy in respect of these votes.

Objections were made at the meeting that this proxy was invalid; 1st, because it was not in the form required by the articles; 2, that the company could not properly give a proxy; and 3, that the company which gave the proxy was not the registered holder of the shares.

On the 1st and 2nd objections. The *Zoedone Company* were described in the proxy not as members, but as "proprietors of 12,235 shares." To this proxy the seal of the company was affixed, and it was signed by two of the directors and countersigned by the secretary.

As to the 3rd objection, the evidence before the Court was in a very unsatisfactory condition, but the Court considered it proved that there had been two companies, each registered as the *Zoedone Company, Limited*. The original company of that name had resolved to hand over its assets to a new company, the new company undertaking the liabilities of the old company. Either in June 1882 or 1883 the 12,235 shares in question, which had been standing in the names of three individuals, presumably in trust for the original company, were transferred into the corporate name of the *Zoedone Company*, and were registered in the name of that company. There was no evidence before the Court as to whether at the date of the meeting of the 15th of October, 1883, the old company had or had not ceased to exist.

On the 3rd of November an order continuing the winding-up of the company under supervision was made.

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On the 30th of November a summons was taken out before Vice-Chancellor *Bacon* by 205 shareholders of the *Indian Zoedone Company, Limited*, holding together 14,939 shares, asking a declaration that Mr. *Spain* was not duly appointed liquidator, and that so much of the special resolution alleged to have been passed by the said company on the 27th of September, and confirmed on the 15th of October, 1883, which purported to appoint him liquidator was invalid and void, and that a person then named might be appointed liquidator in his place.

There was no suspicion of improper conduct on the part of Mr. *Spain*.

1884. Jan. 19. This summons was adjourned into Court and heard by Vice-Chancellor *Bacon*, and dismissed with costs, the Vice-Chancellor holding that no notice of the proposed appointment of a liquidator was necessary. Upon the hearing before the Vice-Chancellor, only an affidavit filed on the 30th of October, 1883, by *W. Barker*, who was present at the second meeting, was read. He therein stated the two former objections only as those on which the votes were disallowed, and the third objection was not discussed.

Upon the hearing of the appeal an affidavit was produced made by the chairman of the meeting, in which he stated the three objections, and proceeded to say that, acting to the best of his ability, he had considered the objections and disallowed the votes.

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The applicants appealed. The appeal was heard on the 19th of February, 1884.

Warrington, for the Appellants:—

The Vice-Chancellor held that no notice need be given of an intention to appoint a liquidator, inasmuch as such an appointment is, under sect. 133 of the *Companies Act*, 1862, incidental to the winding-up of a company. But that presupposes an effective and complete winding-up—and where there is no such winding-up, and where, as here, the resolution to wind up required confirmation at a subsequent meeting, notice I submit is necessary.

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The authorities appear to be conflicting. In *In re Stearic Acid Company* (1) Vice-Chancellor *Kindersley* held the appointment of a liquidator void, on the ground that no notice of the intention to appoint him had been given. That case was no doubt decided under the Act of 1856 (19 & 20 Vict. c. 47), but the words of the 28th clause of Table B, which were incorporated with that Act, are for the present question similar to the provisions of the Act of 1862.

Against the Appellants' contention is what is only a *dictum* of Lord *Chelmsford* in *Oakes* v. *Turquand* (2). It was not relevant to the decision of that case, for it was undoubted that the liquidator had been properly appointed by the order of the Court, but independently of that, that case is distinguishable from the present, for there the resolution to wind up did not require confirmation, so that a shareholder on receiving notice of the intention to propose a resolution for the winding-up of the company must be presumed to have known that immediately on its passing there would be an effective winding-up to which the appointment of a liquidator would be merely incidental.

In *In re Welsh Flannel and Tweed Company* (3) Vice-Chancellor *Malins* held that a notice of an intention to appoint a liquidator was involved in a notice of a proposed resolution to wind up. But in that case, again, the question at issue here was not raised; for the liquidator had in fact been appointed subsequently to the second meeting, at which time there was an effective winding-up.

But where a shareholder is told of a resolution to wind up, which must be confirmed to give it any efficacy, he is in effect told that he will be able to record his vote at the second meeting, and the appointment of a liquidator is not incidental to a resolution to wind up passed at the first meeting.

Assuming that the resolution appointing Mr. *Spain* liquidator was rejected at the second meeting, the company cannot fall back upon the resolution passed at the first meeting. There is, therefore, no liquidator of the company, and the Court is asked

(1) 32 L. J. (Ch.) 784; 11 W. R. 980.

(2) Law Rep. 2 H. L. 325, 354, 355.

(3) Law Rep. 20 Eq. 360.

now, under sect. 141, to appoint one, or to direct, under sect. 149, a meeting to be held.

The disallowance of the votes by the chairman was improper. The objections as to the form and the execution of the proxy are clearly untenable. The article is not imperative in requiring any particular form of proxy, and assuming that a company may be the registered holder of shares, no formality was wanting for the due execution of the proxy.

Hemming, Q.C. (*Oswald* with him), for the company:—

No personal objection to the liquidator has been raised either here or below, and the question is an idle one.

The Vice-Chancellor was right in holding notice unnecessary, as the intention to appoint liquidators must be involved in an intention to wind up, and although it may be premature to pass a resolution at the first meeting, appointing a liquidator, and such resolution must necessarily drop if the principal resolution is not confirmed, still the confirmation at the second meeting of the principal resolution operates upon and gives retrospective efficacy to the incidental resolution.

The chairman had before him, besides those mentioned by the Appellants, the further objection that the shares did not belong to the company which gave the proxy, and he, taking all the objections into consideration, disallowed the votes. How much weight he attributed to each objection is not stated, and it is not necessary to inquire.

The chairman's declaration in the minute-book must be taken to be correct until it is proved to be false, and the *onus* of proving this falsity, which lies on the Appellants, has not been satisfied.

Marten, Q.C. (*Latham* with him), for the Petitioner:—

If there is no liquidator then the Petitioner is entitled to the carriage of the order, but it is submitted that the liquidator was duly appointed at the first meeting. The appointment of a liquidator is one of the consequences of a voluntary winding-up: sect. 133, sub-sect. 2 of the Act of 1862; and no provision in the Act prohibits a company in contemplation of a voluntary winding-

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up, and in the interval between the passing and confirmation of a resolution to wind up, appointing a liquidator, which appointment will be good immediately on the confirmation.

In re Stearic Acid Company (1) is no authority for the Appellants. The argument turned entirely on the provisions of Table B.: and it would appear that in that case there was an effective winding-up, and the correctness of that decision is disputed by Vice-Chancellor *Malins* in *In re Welsh Flannel and Tweed Company* (2). *Oakes* v. *Turquand* (3) is in our favour. The words of the Lord Chancellor are quite general, that whenever there is a winding-up the appointment of a liquidator is necessary.

But at all events the declaration of the chairman has not been satisfactorily challenged. By sect. 67 a minute of proceedings at a general meeting, signed by the chairman, is *primâ facie* evidence, and by the same section the appointment of a liquidator (among other officers) shall be deemed valid until the contrary is proved.

Then there has been such a lapse of time here as is fatal to the Appellants' claim. If only twenty-one days are allowed within which an appeal from the decision of a Court in a winding-up must be brought, a longer time should not be given to impeach the decision of the chairman. Vice-Chancellor *Malins* in *In re Welsh Flannel and Tweed Company* relied on lapse of time as a bar to an application like the present.

Warrington, in reply.

EARL OF SELBORNE, L.C.:—

It appears to me, without reference to authorities one way or the other, that it is not possible to appoint a liquidator, especially without notice of an intention to propose him, except in a case where there is an effective resolution to wind up the company; and consequently that, when a special resolution to wind up which requires confirmation has been passed, although it may be an unobjectionable mode of proceeding to go on to pass a

(1) 32 L. J. (Ch.) 784; 11 W. R. 980. (2) Law Rep. 20 Eq. 360.
(3) Law Rep. 2 H. L. 325.

provisional resolution on the subject of the liquidator, yet that resolution can by itself have no effect or operation; and that if at the meeting held for confirmation of the principal resolution on which the appointment of a liquidator depends, the shareholders present confirm the principal resolution, but decline to confirm the proposed nomination of the liquidator, it is impossible to fall back upon the original resolution passed at the time when the liquidator could not be appointed, and treat that as binding notwithstanding that the shareholders, when confirming the resolution to wind up, decline to confirm the resolution to appoint the particular person nominated as liquidator. Everything, therefore, here turns upon what took place at the second meeting, when, beyond all doubt, due notice having been given as to both matters, there was a vote taken both as to the resolution to wind up, which was confirmed beyond controversy, and as to the resolution to appoint Mr. *Spain* liquidator, which on the one side is said to have been confirmed, and on the other side is said to have been rejected.

The clause in the Act to which Mr. *Marten* referred shews that all appointments are presumed to be good until they are shewn to be invalid, at all events when they have been *primâ facie* made and acted upon; and that the minutes in the books are to be received, not as conclusive, but as *primâ facie* evidence of resolutions and proceedings at general meetings; and also it may be added, and I think correctly, that inasmuch as the chairman who presides at such meetings, and has to receive the poll and declare its result, has *primâ facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minute in the books; and, though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute-book, following the decision of the chairman, that the result of the poll was different from that there recorded.

The question upon this part of the case is whether that *onus* has been satisfied by the Appellants; and it appears to us that it cannot be said to have been satisfied, though I must say for myself that I should think the case left in a very unsatisfactory

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Earl of Selborne, L.C.

condition upon the circumstances which appear, and those which do not appear, if we could do nothing more than simply, on the ground of the failure to satisfy the *onus probandi*, deal with the present appeal motion. The grounds of objection which, as I think we must take it upon the materials before us, were urged to the votes which the chairman, according to the best of his judgment, rejected at the time, seem to have been three; one, that it was an improper deviation from the form of proxy to describe the person giving the proxy as a "proprietor of shares," instead of describing him as a "member." Speaking for myself I have no difficulty in saying that I think that objection untenable, and that if the rejection of those votes depended upon that, we should be in a situation to say they were improperly rejected. "Proprietor of shares," in such a matter, must mean the legal proprietor upon the face of the register; there is nothing to suggest on the face of the proxy that it could be meant in any other sense, and as the article does not say the form must be literally followed provided the proxy is to the same effect, upon that point my opinion certainly is that the proxy was to the effect required, and that there is nothing in that objection. Then the next point suggested, as to a corporation not being able to give a proxy, also appears to me, in a case in which it is not disputed that a corporation could be a member of a company, and a proprietor of shares, to have nothing in it; and if this corporation which gave the proxy was the proprietor of the shares in question, there seems to be no fault to find with the manner in which the proxy was given. It is given under the common seal with the signatures of two directors, and counter-signed by the secretary. But there was a third objection; for so I think we must take it upon the materials before us—not very satisfactory materials, as is often the case in matters relating to the winding-up of companies—I think we must take it that there was a third objection; which was, that the shares which were registered in the name of the *Zoedone Company* were not the shares of the company which gave the proxy; and it appears that we must take it, after what has been stated on the one side and not denied on the other, as a fact (being one which must be perfectly well known to everybody concerned, and my learned brother has also, I believe, had some

judicial knowledge of it upon this bench in other proceedings), that there were two *Zoedone Companies*, one of which had existed before the year 1882, and as to which there is nothing shewn from which it can be taken for granted that it had been finally wound up and dissolved, so as to no longer have a legal existence under that name.

In the year 1883 another *Zoedone Company* appears to have been formed. Between one side and the other there is a difference of one year as to that; but either in June, 1882, or June, 1883, the shares in question, which had previously stood in the names of certain individuals—and to me it appears to be absolutely immaterial for whom they may have held them in trust—were transferred into a corporate name, that is to say, the name of the *Zoedone Company;* and it appears that there were or had been, and it does not appear that there had ceased to be, two companies of that name. I cannot myself conceive anything less convenient, or more likely to produce perplexity and embarrassment, than that when a company transfers its business and a new company is formed, the new company should, without any variation whatever, simply adopt and register itself in the name of the old company; and if it does so, and if perplexity and inconvenience arise out of it, one cannot but say that the blame must rest with those who have chosen to take so imprudent a course. But the identity of the company registered, whether in 1882 or 1883, as the owner of this considerable number of shares, with the company whose proxy was tendered, appears to have been called in question, and that appears to have been the ground on which the votes were rejected by the chairman. If it was so, we are not in possession of any materials which would enable us to decide that question. Mere conjecture or supposition of what is most probable will not do for such a purpose, and therefore I am bound to say that there was upon this occasion a burden of proof on the Appellants, who desire that we should overrule the decision of the chairman and treat the *primâ facie* evidence of the minute book as contradicted by the facts. That *onus* is not satisfied. But I cannot help saying that, to my mind, it would have been most unsatisfactory if we had been compelled on that ground alone to affirm the decision of the Vice-Chancellor, leaving matters

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in the state of uncertainty in which they now are. But having to deal with this state of things, and the Appellants making no personal objection to Mr. *Spain* as liquidator, except that they do not place confidence in the persons at whose instance Mr. *Spain* was nominated, it appears to me that the course most for the benefit of this company, most advisable, and most proper, under all the circumstances, will be, that the Court, not in other respects disturbing the Vice-Chancellor's order, should by its own order confirm Mr. *Spain* in the office of liquidator. If, which I by no means expect or think probable, he should do anything which may hereafter require his removal, of course everybody interested will have leave to take any step which in that state of circumstances may be requisite; but at present I think it would be well to make his title unquestionable by an order of that kind.

COTTON, L.J.:—

I agree. The first question which I consider is this, whether the Respondents here can rely upon the resolution which appointed Mr. *Spain* liquidator at the first meeting. Now I am of opinion that they cannot, because although it is very true that when there is a liquidation, the necessary consequence is that a liquidator must be appointed, yet there is in this case no liquidation until the resolution passed at the first meeting is confirmed at the second; and therefore it was really no notice to those to whom the notice of the first meeting was sent that the liquidator would be appointed if that resolution was carried, because that resolution, until confirmed, could not carry with it of necessity the appointment of a liquidator. But there is the second meeting also to consider, and what took place at it. Now here, as I understand, upon the minute books of the company, which are *primâ facie* evidence, it appears that by the resolution which was passed at the second meeting Mr. *Spain* was appointed liquidator. It is clearly for those who object to impeach that. It is said that there were objections taken to proxies for 12,235 shares, but that those objections, though allowed by the chairman, were not good objections. As regards two of the grounds of objection, I will not say anything more than that I concur with the Lord Chancellor.

Whether the objection depends on the form of the document or on the general point of law, the Court can decide, and is bound to decide, when the question comes before it, whether the decision of the chairman was right or wrong; but until the contrary is shewn his decision must be held to be right, that is to say, the Court must decide the question between the parties, but not until those who object to his decision satisfy the Court before whom the question comes that his decision was wrong. Then there was the substantial objection not referred to in the affidavits of the Appellants here, that those shares were not the shares of the company which had given the proxy. That is certainly a formidable objection, and we have not such evidence before us here as would justify us in saying that the decision of the chairman on that point was wrong. The Appellants seem to consider that it was for the Respondents to justify and support the chairman's decision. In my opinion that is their fallacy; it is for them to satisfy us that that decision was wrong, not for those who rely upon that decision to bring evidence to shew that in fact it was right. We can only decide this case here as between the parties who are now before us. And I think, having regard especially to the state in which the evidence is, that the most satisfactory course, and that which will be best for all parties, will be to confirm the appointment of Mr. *Spain*, so that there may not be in future any doubt as to whether or not he is duly appointed liquidator of this company.

Solicitors: *Clarke, Woodcock, & Ryland; Vallance & Co.; F. Heritage & Co.*

M. W.

C. A.
1883
PEARSON, J.
Dec. 17.
C. A.
1884
Feb. 20.

In re SARAH KNIGHT'S WILL.

Trustee—Costs—Tacit Obstruction to Cestui que Trust—Refusal of Representative of deceased Trustee to appoint new Trustees—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—*Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1—*Jurisdiction to order Respondent to pay Costs on Petition under Trustee Act*, 1850.

The executors of the sole executor of a deceased sole trustee whose sole executor had never acted in the trust, were applied to in April, 1883, to take steps to enable the tenant for life of a small sum of stock standing in the name of the deceased trustee to receive the dividends. In May, 1883, the executors handed to the solicitor of the tenant for life the probate of their testator's will, that he might produce it at the *Bank of England*, which he did. After some correspondence, in the course of which the executors asked for evidence of the title of the *cestuis que trust*, which did not appear to have been produced, the solicitor of the tenant for life about the end of May sent a power of attorney to be executed by the executors to enable her to receive the dividends. The executors did not execute or return the power. In July the solicitor of the tenant for life applied to the executors to appoint new trustees under the *Conveyancing and Law of Property Act*, 1881, to which the executors replied, stating their ignorance of the title of the *cestuis que trust*. Ultimately, in November, 1883, the *cestuis que trust* presented a petition for the appointment of new trustees and a vesting order:—

Held, by *Pearson*, J., that the representative of a deceased trustee is not bound at the request of the *cestuis que trust* to exercise the power of appointing new trustees given by the *Conveyancing and Law of Property Act*, 1881; and that the refusal to do so was not a sufficient reason for ordering the executors to pay the costs of a petition for the appointment of new trustees:—

But *held* by *Pearson*, J., that the conduct of the executors, who on the materials before him appeared to have accepted the trust by taking a transfer of the stock into their own names, had been vexatious, and that they must pay the costs which would have been occasioned by a petition simply asking for payment of dividends to the tenant for life, and that they could not be allowed any costs out of the fund.

The executors appealed:—

Held, that an objection that this was an appeal for costs only was not sustainable:—

Held, also, that as the *cestuis que trust* had not taken proper steps to satisfy the executors as to their title, the executors had not been guilty of any such misconduct as is necessary to deprive a trustee of his right to costs out of the trust fund, and that they must have their costs below,

but that as the Court of Appeal was not satisfied with their conduct they ought to have no costs of their appeal.

Whether under the *Judicature Acts* and the Orders of 1883, Order LXV., r. 1, the Court has jurisdiction to order a respondent to a petition under the *Trustee Act*, 1850, to pay costs, *quære*.

C. A.
1884
In re SARAH KNIGHT'S WILL.

THIS was a petition under the *Trustee Act*, 1850, and the Act 15 & 16 Vict. c. 55, for the appointment of new trustees of the will of *Sarah Knight*, widow.

The testatrix by her will, dated the 12th of April, 1850, bequeathed to *Richard Balchin*, his executors, administrators, and assigns, the sum of £150, upon trust to invest the same as therein mentioned, and to pay the income to *Maria Walker* for her life, for her separate use, and, from and after her decease, as to the principal sum and the investments representing the same, and the income thereof, in trust for all and every the children or child born or to be born of her the said *Maria Walker* who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, as tenants in common, if more than one, and, if but one such child, in trust for that one child. And the testatrix appointed the said *Richard Balchin* executor of her will. The testatrix died in the year 1859. *Balchin*, after paying the legacy duty on the legacy of £150, invested £100, part of the balance, in his own name in the purchase of £114 12*s.* 3*d.* New 3 per Cent. Annuities. He died in the year 1870, having by his will appointed his son *H. J. Balchin* his executor. *H. J. Balchin* died in 1879, having by his will appointed *F. Clift* (a solicitor) and *C. F. Jervis* his executors. They were also residuary legatees under his will. After the death of *Richard Balchin*, and up to the middle of the year 1882, *Maria Walker* continued to receive the dividends on the £114 12*s.* 3*d.* New 3 per Cents. under a power of attorney which had been given by him to her bankers, the *Bank of England* not having received notice of the death of *Richard Balchin*. In the middle of the year 1882, however, the bank received notice of *Richard Balchin's* death, and they thereupon declined to act on the power of attorney, and Mrs. *Walker* was unable to obtain payment of her dividends. She in March, 1883, instructed Mr. *Murrough*, her solicitor, to endeavour to obtain payment of the

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dividends. Up to this time *Clift* and *Jervis* were ignorant of the trust in favour of Mrs. *Walker*, inasmuch as their own testator had never taken any part in the administration of it. On the 3rd of April *Murrough* called at *Clift's* office. He deposed that he there produced to a clerk an office copy of *Sarah Knight's* will, and explained the contents to him, but *Clift* denied all knowledge of this. Some correspondence took place between *Murrough* and *Clift*, and the latter in April asked to have the title of Mrs. *Walker* shewn, but it did not appear that this was done. On the 12th of May, 1883, the probate of *H. J. Balchin's* will was lent to *Murrough* that he might produce it at the *Bank of England*, which he did, and he deposed that he caused the stock to be transferred into the names of *Clift* and *Jervis*. This, however, was an erroneous statement, as they never executed any transfer, but in the argument before Mr. Justice *Pearson*, and in his judgment, the statement was assumed to be correct. On the 26th of May *Murrough* returned the probate to *Clift* with a letter inclosing a power of attorney for Mrs. *Walker's* bankers to receive the dividends, and requesting that *Clift* and *Jervis* would execute and return it. Having received no reply to this letter, he wrote again to *Clift* on the 9th of June, 1883, saying that he should issue a writ against *Clift* and his co-trustee unless the matter was settled by the 13th inst. A clerk of *Clift's* called on *Murrough* on the 11th of June. *Clift* deposed that he deferred writing to *Murrough* "in the hope that I should be able to learn something of Mrs. *Walker's* position, but being unable to do so my clerk called on *Murrough*, but no evidence was forthcoming." *Murrough* deposed that the clerk told him that *Clift* had been much engaged, but that Mrs. *Walker's* matter should have his immediate attention. *Murrough*, not having heard anything further from *Clift*, wrote to him on the 18th of July, requiring him and his co-executor, within one week from the date of the letter, under the powers vested in them by sect. 31 of the *Conveyancing Act*, 1881, to consent to the appointment of two persons whom he named as trustees of the will of *Sarah Knight* and to transfer the stock to them, and stating that if this was not done within a week he should apply to the Court, and ask that they should pay the costs of the application. In reply to this letter

Clift, on the 21st of July wrote to *Murrough* as follows:—"I beg to inform you that I have never seen the will of *Sarah Knight*, the person referred to in your letter, and have no knowledge as to who is entitled under such will. Further, you have not furnished me with any evidence as to whether the will falls under the provisions of the *Conveyancing Act*, 1881, s. 31, and I have no personal knowledge as to whether my testator was the personal representative of the last surviving or continuing trustee. On behalf of myself and my co-executor I have to request that you will satisfy our solicitor, Mr. *Edward Kennedy*, on these points, when we shall be willing to comply with your request on payment of any costs." No claim had been made by *Clift* or *Jervis* to the stock on behalf of the estate of *H. J. Balchin*, or of the estate of *Richard Balchin*. *Murrough* called on *Kennedy* on the 25th of July, when, as *Murrough* deposed, *Kennedy* promised to see his clients and get the matter arranged. *Kennedy*, however, deposed that, as he knew nothing of the circumstances of the case, he requested *Murrough* to make a statement in writing of the circumstances and forward it to him, when he would see *Clift* and do what was requisite. He said that *Murrough* thereupon promised to do so; but he added that he had never received any such statement, or any other communication from *Murrough* until service of the petition upon *Clift*. *Murrough* denied that *Kennedy* ever requested him to make a statement in writing of the circumstances of the case, or that he promised to do so. In reply to this denial *Kennedy* reiterated his former statement. On the 3rd of August, *Murrough*, not having received any communication from *Kennedy*, wrote to him asking him whether he would, on behalf of *Clift* and *Jervis*, accept service of a petition. No reply to this letter was received by *Murrough*. *Kennedy* said that he never received the letter.

The petition was presented on the 15th of November, 1883, by Mrs. *Walker*, *Edwin Clarke*, and *Harriet* his wife, and *W. H. Steere*, and *Anna Maria* his wife. Mrs. *Clarke* and Mrs. *Steere* were the only children of Mrs. *Walker* who had attained twenty-one or married. The petition prayed that *Steere* and one *J. C. Collier*, might be appointed new trustees of *Sarah Knight's* will; that the right to call for a transfer and to transfer into their own

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names the sum of stock standing in the names of *Clift* and *Jervis*, and to receive the dividends thereon, might be vested in *Steere* and *Collier* as such trustees as aforesaid; and that *Clift* and *Jervis*, or one of them, might be ordered to pay the costs of and incidental to the petition.

The petition was heard before Mr. Justice *Pearson* on the 17th of December, 1883.

Higgins, Q.C., and *Manby*, for the Petitioners:—

The Respondents ought to pay all the costs of the petition. They ought to have executed the power of attorney when requested to do so, and, not having done that, they were bound to exercise the power of appointing new trustees given to them by sect. 31 of the *Conveyancing Act*, 1881. They were in the position of trustees for the Petitioners after the stock had been transferred into their names. The Court has now under the *Judicature Act* and Rules ample jurisdiction as to costs: *Ex parte Mercers' Company* (1); *In re Lee and Hemingway* (2); *Ex parte Hospital of St. Katharine* (3). The mere passive neglect of a trustee to take the steps necessary to enable his *cestui que trust* to obtain payment of the trust fund, is a sufficient ground for visiting him with costs: *In re Primrose* (4). In that case Lord *Romilly*, M.R., expressed an opinion to this effect, though he held that under the *Trustee Act*, 1850, there was no jurisdiction to order the representatives of a trustee to pay costs. That difficulty is removed by the *Judicature Act*.

Colquhoun, for the Respondents:—

I do not dispute the jurisdiction, but I say there is no ground for making us pay costs, or even for depriving us of our costs. Our testator never acted in the trust, and we had no means of knowing anything about it, and in fact, knew nothing about it, until the application was made to us on behalf of Mrs. *Walker*. We were entitled to satisfactory evidence of her title, and this was not furnished to us before the petition was presented. There is no obligation on the representative of a deceased trustee to

(1) 10 Ch. D. 481.
(2) 24 Ch. D. 669.
(3) 17 Ch. D. 378.
(4) 23 Beav. 590.

exercise the power of appointing new trustees given by sect. 31 of the *Conveyancing Act*. The old rule still exists that a trustee (and this includes executors and administrators of a deceased trustee) is entitled to costs out of his trust fund unless he has acted improperly: *Turner* v. *Hancock* (1). We have not "unreasonably resisted any proceedings" within the meaning of rule 1 of Order LXV. (2) of the Rules of the Supreme Court, 1883.

When we were threatened with legal proceedings, we were justified in employing a solicitor.

Higgins, in reply:—

[PEARSON, J.:—Can I order the Respondents to pay any costs? I can of course deprive them of costs. The late Sir *G. Jessel*, M.R., seems to have thought that, unless a trustee or mortgagee has been guilty of gross misconduct, he is entitled to his costs as a matter of contract. Rule 1 of Order LXV. says nothing about ordering a trustee to pay costs.]

The words in the rule which refer to unreasonable conduct are new. The *Judicature Act* has not affected the old power of the Court of Chancery to order a trustee who has misconducted himself to pay costs.

[PEARSON, J.:—Suppose trustees simply decline or neglect to do anything, and the *cestui que trust* is compelled to come to this Court; could the Court make them pay costs?]

In re Primrose (3) goes to that extent; it shews that tacit obstruction is a sufficient reason for ordering a trustee to pay costs.

[PEARSON, J.:—In the present case the Respondents simply stood by and declined to interfere. Has the Court in such a case ever ordered the executor of a trustee to pay costs?]

(1) 20 Ch. D. 303.

(2) Rule 1 provides that, "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

(3) 23 Beav. 590.

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In *In re Primrose* (1) an order was actually made that the assignees in bankruptcy of a trustee should pay costs under such circumstances, and the order was altered only because it was afterwards pointed out to Lord *Romilly* that there was no jurisdiction to make it under the *Trustee Act*. By sect. 31 of the *Conveyancing Act* the duty of appointing a new trustee is imposed on the persons to whom the power is given, though it is only said that they "may" appoint.

Pearson, J.:—

I must say that I think the conduct of the Respondents has been shockingly vexatious. [After stating what took place prior to the supposed transfer of the stock into the names of the Respondents, his Lordship continued:—]

Mr. *Clift* acted rightly in lending the probate of *H. J. Balchin's* will to Mr. *Murrough* to enable him to procure a transfer of the stock into the names of the Respondents, and I am bound to assume that this transfer was made with their assent into their names as the personal representatives of *Richard Balchin*. By so acting they practically accepted the trusts of Mrs. *Knight's* will, and became bound to pay the dividends to Mrs. *Walker*. Mr. *Murrough* sent them a power of attorney, and asked them to execute it in favour of Mrs. *Walker's* bankers, so as to enable them to receive the dividends for her. This was about as simple and proper a request as was ever made to any one, but that power was never executed by the Respondents. After waiting in vain for its execution (the Respondents being the residuary legatees of their testator as well as his executors, and never having made any claim to the fund on behalf of his estate or of the estate of his father), Mr. *Murrough* threatened to take proceedings against them. Mr. *Clift* asked for further information about Mrs. *Walker's* title to the fund, and then he thought it right to put the matter into the hands of another solicitor, he being himself a solicitor, and, so far as I can see, his only object in so doing was to throw costs upon this small fund. Mr. *Murrough* then endeavoured to induce this new solicitor to do that which was right

(1) 23 Beav. 590.

in the matter, but without success. For some months he had been trying to get the dividends of this small fund for his client, and had failed without any fault of his own. Under these circumstances a petition to this Court became necessary. The petition prays for the appointment of new trustees of the fund. This is a matter of course, and under the circumstances I have no objection to appoint the husband of one of Mrs. *Walker's* daughters one of the trustees of this very small fund, though his wife is one of the *cestuis que trust*. There must be an order vesting in the new trustees the right to call for a transfer of the stock, or the Respondents must execute a transfer to them.

There remains the question of the costs of the petition. It is said that the Respondents ought to pay all the costs, and I think that in honour they are bound to do so. On their behalf it is said that they are trustees, and that they ought to be paid their costs out of the fund. I agree that the old rule still remains in force, that a trustee who discharges his duties properly is entitled to receive his costs out of his trust fund. There are two grounds upon which it is said that the Respondents ought to pay costs. The first is this, that by sect. 31 of the *Conveyancing Act*, 1881, they were authorized to appoint new trustees, that they were asked to do this and they refused. I do not think that on that ground I can order them to pay costs. I can conceive of many cases in which persons who are trustees simply as being the representatives of a deceased trustee may be very properly advised to do nothing to make themselves trustees. The second ground is, that, on the transfer of the fund into their names, they became trustees of it, and as such bound to pay the dividends to Mrs. *Walker*. I am of opinion that that was their real position, and that, as they had never asserted any right to the fund on behalf of the estate either of *Balchin* the father or of *Balchin* the son, they were bound after the transfer to pay the dividends to Mrs. *Walker*, and if the petition had simply asked for the payment of the dividends to her, I should have made the Respondents pay the costs of it. But it asks also for the appointment of new trustees of the fund, and, as I am of opinion, as I have already said, that the Respondents were not bound to exercise the power given to them by the *Conveyancing Act*, I cannot compel them to

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pay all the costs of a petition which was necessary for the appointment of new trustees. But I shall order them to pay so much of the costs as would have been incurred if the petition had asked simply for the payment of the dividends, and I shall give them no costs.

Colquhoun:—The petition might have been presented in the County Court.

Pearson, J.:—

You can raise that point before the Taxing Master.

W. L. C.

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The executors appealed, and the appeal was heard on the 20th of February, 1884.

Colquhoun, for the Appellants.

Higgins, Q.C., took the preliminary objection that this was an appeal for costs.

Cotton, L.J.:—

The preliminary objection fails. A trustee is entitled to costs unless it is adjudicated against him that he has been guilty of misconduct, and until that is adjudicated his costs are not within the discretion of the Court. Whether he has been guilty of misconduct is a matter on which an appeal must lie.

Fry, L.J. concurred.

Colquhoun, for the appeal:—

The executors have not been guilty of any misconduct. That the fund was transferred into our names without our knowledge cannot alter our position.

[Cotton, L.J.:—It cannot have been transferred into the names of the executors without their knowledge, no one but they could transfer it.]

There is no pretence that we have transferred it, and it must therefore be standing still in the name of *Richard Balchin*. The

executors have done nothing unreasonable; they were ignorant of the facts, and no sufficient information was given them before these proceedings were commenced. There is no jurisdiction under the *Trustee Act*, 1850 to make a respondent pay costs: *In re Primrose* (1).

Higgins, Q.C., and *Manby*, *contrà*:—

We contend that Mr. Justice *Pearson* was right in considering that the Appellants vexatiously and unreasonably declined to do what was necessary to enable the tenant for life to receive the dividends.

[FRY, L.J.:—Did you ever answer their inquiry who you were and what your title was?]

Not in express terms.

[FRY, L.J.:—I do not see on the materials before us that you answered it either in terms or in substance.]

It was reasonable to order the Appellants to pay part of the costs. Assuming that there was no transfer to them, still they had control over the fund, and are in the same position as if it was vested in them. They would not execute a power of attorney which was sent them, and in fact would not do anything. Then as to the jurisdiction to order them to pay costs, the *Judicature Act*, 1873, puts costs in the discretion of the Court. This enactment and Order LXV., r. 1, of the Orders of 1883 extend the jurisdiction of the Court as to costs.

[COTTON, L.J.:—It may not become necessary to decide the point, but I doubt whether the Act and Orders mean more than this, that where the Court can give costs they shall be in the discretion of the Court.]

The authorities shew that the Act and Orders authorize the Court to give costs in cases where it could not formerly have given them: *Ex parte Mercers' Company* (2), *In re Lee and Hemingway* (3), *Ex parte Hospital of St. Katharine* (4). *Garnett* v. *Bradley* (5) also supports our contention.

(1) 23 Beav. 590.
(2) 10 Ch. D. 481.
(3) 24 Ch. D. 669.
(4) 17 Ch. D. 378.
(5) 3 App. Cas. 944.

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[Cotton, L.J.:—In that case there was jurisdiction to give costs apart from the Act and Orders.]

Cotton, L.J.:—

In the view we take of this case it is not necessary for us to decide whether, if the case had been one in which it was right to make the executors pay costs, Mr. Justice *Pearson* had jurisdiction to make such an order upon them on a petition under the *Trustee Act*, 1850, to which they were Respondents. Trustees are entitled to their costs unless they have been guilty of misconduct, and a mere slip will not disentitle them. In the present case the Appellants are in a peculiar position, they come in as the executors of a testator who died in 1879, and who was the executor of *Richard Balchin* who died in 1870. *Richard Balchin* had invested the legacy in question, and had given a power of attorney to the tenant for life to receive the dividends. The bank not being aware of his death, went on paying the dividends under the power of attorney till 1882. The consequence was that a long delay took place before the Appellants had their attention called to the trust, of which till 1882 they knew nothing. If the solicitor of the Petitioners had put before the Appellants a statement in writing shewing the nature of his client's title, the case would have stood very differently. It is questionable whether the probate of the will of the original testatrix was ever produced. There is a conflict of evidence on the point, and upon the whole of the evidence we cannot come to the conclusion that such information was given to the Appellants as to make their conduct vexatious or unreasonable. Mr. Justice *Pearson* seems to have gone on the ground that the Appellants had accepted a trust by authorizing a transfer of the stock into their own names. This is a misapprehension, all they did was to lend the probate to the solicitor of the Petitioners, who took it to the bank that an entry might be made shewing who the executors were. The stock cannot have been transferred, as Mr. Justice *Pearson* supposed, for it is not alleged that the Appellants ever executed a transfer; and the solicitor could not obtain a transfer into their names by taking the probate to the bank. If they had accepted the trust by taking a transfer of the fund into their own

names, that would have made a difference. In my opinion the Appellants have not been guilty of any such misconduct as would justify the Court in depriving them of costs, and they must have their costs of the petition in the Court below. We are not, however, quite satisfied with their conduct, and do not give them any costs of the appeal.

FRY, L.J.:—

I take the same view. Looking at the lapse of time, and at the fact that the Appellants only came in as executors of a person who appears never to have acted in the trust, it was not unreasonable for them to require a statement of the title of Mrs. *Walker*. If in answer to the letter written by *Clift* in April, 1883, a short statement of Mrs. *Walker's* title had been sent, the Appellants would have been bound to attend to it. But no such statement was furnished, and I think there is no sufficient ground for depriving them of costs. I think, however, that, if they had been willing to take a little more pains, the expense of these proceedings about this very small fund might have been avoided, and I agree that they ought to have no costs of the appeal.

Solicitor for Petitioners: *J. P. Murrough.*
Solicitor for Respondents: *Edward Kennedy.*

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[1882 S. 332.]

Covenant to settle after-acquired Property of Wife.

By an ante-nuptial settlement made in 1870 the intended husband and wife respectively covenanted with the trustees that all the estate, property, and effects, real or personal, of or to which the wife, or the husband in her right, should at any time during the coverture become seised, possessed, or entitled, should be assured and settled, as regarded personal estate, upon trust, as to such part thereof as should not consist of money or authorized investments, or of interests determinable on the death of the wife, upon trust to convert it, and to invest the proceeds, and such part of the estate as should consist of money, upon such investments as therein mentioned, and during the joint lives of husband and wife pay "the interest, dividends, and annual proceeds thereof" to them in equal shares, the share of the wife to be for her separate use without power of anticipation. By a deed of the same date the wife's father covenanted with the trustees to pay to them an annuity of £500 to be applied by them upon trusts corresponding with those of the income of the personal property mentioned in the covenant. In 1874 the wife's father bought up the husband's interest in this annuity, and assigned it to trustees for the wife's separate use with no restraint on anticipation :—

Held (affirming the decision of *Pollock*, B.), that the covenant to settle included life annuities given to the wife, that the share assigned by the wife's father in the annuity of £500 was bound by the covenant, and that, during the joint lives of the husband and wife, three-fourths of the annuity belonged to the wife for her separate use with a restraint on anticipation, and the remaining fourth to the trustee of the husband, who had become bankrupt, and that persons to whom the wife had mortgaged the interest assigned in 1874 took nothing.

Where a covenant has been entered into for settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant.

In re Mainwaring's Settlement (1) observed upon.

By indenture dated the 25th of October, 1870, made before and in contemplation of the marriage of Mr. and Mrs. *Spooner*, Mrs. *Spooner* (then Miss *Lister*) conveyed certain real estate (subject to the life estate of her parents), to the use of herself in fee till the marriage, and after the solemnization of the marriage to the use

(1) Law Rep. 2 Eq. 487.

of trustees during the lives of husband and wife, and the life of the survivor of them, upon trust during the joint lives of husband and wife, to pay one moiety of the rents to the husband, and the other moiety to the wife for her separate use without power of anticipation, and after the decease of either to pay the rents to the survivor for life, and after the decease of the survivor the estate was limited to uses for the benefit of the children of Mrs. *Spooner*.

By an indenture of even date, each of them, Mr. *Spooner* and Mrs. *Spooner*, did for himself and herself, his and her heirs, executors, and administrators, covenant with the same trustees that "all the estate, property, and effects whatsoever both real and personal" which Mrs. *Spooner*, or Mr. *Spooner* in her right, should at any time or times during the coverture become seised or possessed of or entitled to, either in law or in equity, under any gift, devise, or bequest in her favour, or by descent, representation, or any other means whatsoever (with an exception of property which did not exceed £1000 in value, or which consisted of jewels, furniture, &c., or savings of separate income, all which excepted property was to belong to Mrs. *Spooner* for her separate use) should be assigned and settled, and that Mr. and Mrs. *Spooner* respectively should and would, at the costs of the trust estate, do and execute, and concur in doing and executing, all such conveyances, acts, and deeds whatsoever as to the trustees or trustee should seem proper for assuring and settling the same, and every part thereof, according to the nature and quality thereof respectively, for all the estate of the husband and wife, or either of them, to the uses and upon the trusts, &c., thereinafter declared concerning the same (that was to say), as to real estate upon the same uses and trusts as were declared by the above indenture of even date as to the lands therein comprised, "and as to personal estate, including leaseholds, upon the trusts hereinafter declared, expressed, and contained concerning the same, that is to say, upon trust to stand possessed thereof, and as to such part thereof as shall not consist of money or of such stocks, funds, shares, or securities as are herein authorized as investments, or of annuities or other estate or interest for the life of the said *E. E. Lister*, or for any term or period determinable on her death,

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to convert the same into money (but as to any reversionary property or interest not until the same shall fall into possession, unless they or he shall consider that the deferring the conversion thereof will not be advantageous to the trust estate), and to invest the money arising from such conversion, with such parts of the said personal estate as shall consist of money, in or upon such stocks, funds, shares, or securities as hereinafter mentioned, and during the joint lives of the said [husband and wife] pay to them or permit them to receive the interest, dividends, and annual proceeds thereof in equal half shares, the share of the said *E. E. Lister* to be for her sole and separate use," &c., without power of anticipation, and after the death of Mrs. *Spooner* to pay the whole income to Mr. *Spooner* during his life if he should so long continue unmarried, with ulterior trusts which need not be stated.

By another indenture of the same date Mrs. *Spooner's* father covenanted with the same trustees that he would during the joint lives of his wife and another person therein named pay to the trustees an annuity of £500, one moiety of which during the joint lives of Mr. and Mrs. *Spooner* was to be paid to Mrs. *Spooner* for her separate use with a restraint on anticipation, and the other moiety to Mr. *Spooner;* and after the decease of Mr. *Spooner,* if Mrs. *Spooner* survived him, to pay the whole to her for her life, and if he survived her to pay the whole to him for his life if he so long remained unmarried, and subject as aforesaid the annuity was to be applied for the benefit of Mrs. *Spooner's* children in manner in the same indenture mentioned.

By an indenture dated the 31st of December, 1874, made between Mr. *Spooner* of the first part, Mrs. *Spooner's* father of the second part, and the trustees of the settlement of the third part, reciting the first and third of the above indentures of the 25th of October, 1870, and that the father had advanced to or for *Spooner* sums amounting to £2000, and in consideration thereof had requested *Spooner* to assign all his interest in the annuity of £500, and in the rents of the property comprised in the first indenture, to the trustees upon the trusts thereinafter declared, it was witnessed that *Spooner* in consideration of the payments made by the father assigned to the trustees all his, *Spooner's,* right and interest of and in the annuity of £500, and of and in the rents and profits of the

lands comprised in the first deed, to the intent that the same might be received by them and the survivor of them upon trust to pay the same to Mrs. *Spooner* for her life for her sole and separate use, and after her death to pay and apply the same upon such and the same trusts and in such manner as were in and by the thereinbefore recited indentures declared of and concerning the said annuity and the said real estate after the decease of Mr. and Mrs. *Spooner*.

By an indenture dated the 1st of July, 1878, Mrs. *Spooner* assigned to *W. H. Davis* by way of mortgage all the estate, right, and interest of or to which she was under or by virtue of the indenture of the 31st of December, 1874, entitled of and in the annuity of £500 covenanted to be paid by her father in the thirdly above-mentioned indenture of the 25th of October, 1870, and of and in the rents and profits of the estate settled by the first above-mentioned indenture of the 25th of October, 1870.

This action was brought by the trustees of the settlements to have the trusts carried into execution under the direction of the Court, *Spooner* having been adjudged bankrupt, and questions having arisen how the annuity of £500, which was the only present income, ought to be dealt with.

On the 19th of January, 1883, Mr. Baron *Pollock*, sitting for Mr. Justice *Pearson*, gave a judgment declaring that the moiety assigned by the indenture of the 31st of December, 1874, of the annuity of £500 was, during the joint lives of *Spooner* and wife, affected by the covenant to settle after-acquired property contained in the second of the above deeds of the 25th of October, 1870, and that no part thereof passed by the mortgage of the 1st of July 1878, and that three fourths thereof were payable to Mrs. *Spooner*, and the remaining fourth to *Spooner's* trustee in bankruptcy. All further proceedings were stayed.

The representatives of *Davis* appealed, and the appeal was heard on the 25th of February, 1884.

P. B. Abraham, for the Appellants:—

First, I say that the covenant to settle does not include life interests. Life interests are excepted from the trust for conversion, and no trusts are declared of them, the usual provision,

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given in *Davidson's* Precedents (1), being omitted. The trusts are declared in terms not applicable to annuities, and it is the just inference that the covenant was not intended to include them. But suppose it did extend to life interests, I say that this annuity was so given that it was not subject to the covenant: *In re Mainwaring's Settlement* (2), to which, however, *In re Allnutt* (3) appears opposed.

[FRY, L.J. :—Is not the question simply whether the property which it is sought to affect is so given as to come within the terms of the covenant to settle. If it does, how can any declarations by the donor exclude it? Suppose a testator gave £10,000 to a married woman absolutely, would a declaration by him that it should not be subject to her settlement be of any effect?]

According to the decision in *In re Mainwaring's Settlement* the declaration would be effectual.

W. Barber, Q.C., and *Lewin*, for the Plaintiffs, and *Fischer*, Q.C. and *E. Ford*, for Mrs. *Spooner*, were not called upon.

COTTON, L.J. :—

This is an appeal against the decision of Mr. Baron *Pollock* that a certain annuity settled on Mrs. *Spooner* in 1874 was bound by a covenant contained in her marriage settlement executed in 1870. This covenant is in the widest terms. It is a covenant both by the intending husband and the intending wife, that all the estate, property, and effects whatsoever, both real and personal, which the intended wife or the intended husband in her right should at any time or times during the intended coverture become seised or possessed of or entitled to, either in law or in equity (with an exception of certain things which I need not mention), should be settled, as to real estate in manner thereinmentioned, "and as to personal estate including leaseholds upon the trusts hereinafter declared, expressed, and contained concerning the same." We have, therefore, a covenant expressly extending to all real and personal estate to which the lady or her husband in her right might become entitled (except certain particulars of

(1) 2nd Ed. vol. iii. p. 571. (2) Law Rep. 2 Eq. 487.
(3) 22 Ch. D. 275.

personal estate), with a declaration that the trustees should stand possessed of what was included in the covenant and was to be assigned to them, upon certain trusts. Thus far the covenant and declaration of trust clearly would apply to this annuity, as it does not come within the exception to which I have referred, and was given to Mrs. *Spooner* for her separate use without any restraint on anticipation. Then there arises undoubtedly a question whether, upon the true construction of the covenant to settle, it ought not to be held that no trusts are declared which can be held to apply to this annuity, in which case it might be said that as there are no trusts declared, then even if the trustees are to take this annuity, it must be held by them upon the trust declared by the party who gave the annuity, that is to say, to Mrs. *Spooner* for her separate use, with no restraint on anticipation. I think, however, that this is not the correct view. The draftsman has framed the declaration of trust awkwardly. Immediately after the words "upon trust to stand possessed thereof," we find this, "As to such part thereof as shall not consist of money, or of such stocks, funds, shares, or securities as are herein authorized as investments, or of annuities or other estate or interest for the life of the said *Elizabeth Empson Lister*, or for any term or period determinable on her death, to convert the same into money." Then we have another clear parenthesis, "But as to any reversionary property or interest, not until the same shall fall into possession, unless they or he shall consider that the deferring the conversion will not be advantageous to the trust estate." We find then a direction that life annuities and securities in a proper state of investment are not to be converted. Then the trustees are directed to "invest the money arising from such conversion, with such parts of the said personal estate as shall consist of money, in or upon such stocks, funds, shares, or securities as hereinafter mentioned." There is no provision there as to any stocks or securities in a proper state of investment, or as to annuities. Then it proceeds, "And during the joint lives of the said *R. L. W. Spooner* and *Elizabeth Empson Lister*, pay to them or permit them to receive the interest, dividends, and annual produce thereof in equal half shares," the share of the wife to be for her sole and separate use, without

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power of anticipation. In my opinion the words "the interest, dividends, and annual produce thereof," apply not only to the income of the investment which was dealt with in the parenthesis, but also to the income of that which was before supposed to be vested in the trustees, but of which nothing is said in the parenthesis. Mr. *Abraham's* argument, if carried to its results, would come to this, that consols, or a mortgage, or anything that was in a proper state of investment for the purpose of this settlement, would not be dealt with in the direction as to what was to be done with the interest, dividends, and annual produce. Those words are not well chosen for dealing with an annuity, but we must see what was the real meaning of the declaration, and as far as I can see it was this, that the income of the property which was not money nor property which ought to be converted, is dealt with here, as well as the income of the investments directed to be made of property which consisted of money, and of the proceeds of property which was to be converted into money. Whatever the consequence may be, where the parties have entered into a covenant, we have nothing to do but to construe the covenant and give effect to the construction, however inconsistent it may be with what we may guess to have been the real intention of the parties.

Then it is said that the settlement executed by the father in 1874 shews that he did not intend that the covenant should operate upon the annuity which by his direction was assigned in trust for Mrs. *Spooner*, and that therefore the annuity is not affected by the covenant. Now suppose the father had left his daughter £10,000 absolutely for her sole and separate use, and had said in terms as clear as he could that she was to have it absolutely, and that it was not to be settled, it could hardly be contended that this £10,000 was not to be brought into settlement. It was contended that *In re Mainwaring's Settlement* (1) shewed that we ought to give effect to the intention of the donor if he has said that the property was not to come into settlement. Undoubtedly there are expressions used by the learned Judge who decided that case which support such an argument, but what the decision comes to is this, that, looking to the trusts of

(1) Law Rep. 2 Eq. 487.

what was in that case given to the lady it was not property which could on the true construction of the covenant be considered coming within it. In the present case the father gave to Mrs. *Spooner* an estate for life to her separate use without any restraint on anticipation. That is in my opinion clearly within the covenant contained in the marriage settlement, and must be treated as settled upon the trusts therein declared.

BOWEN, L.J.:—

I am of the same opinion. Whether property falls within a covenant to settle after-acquired property or not, must turn, as it seems to me, upon the construction of the covenant. There has been laid down a canon with reference to the construction of such covenants, that when you find the property does not fit the trusts of the settlement, then you may assume as a consequence that it was not intended to come within the covenant at all. That seems to be good sense. But that rule itself is only to my mind a rule of construction, and the question must be, whether, on the true construction of the covenant, the particular property falls within it or not. If that is the right view, it cannot be material to consider the intention with which after-acquired property has been given. A gift is not less a gift because the donor intends that it shall not follow the bargain which the party to whom it was given has made as to its devolution. You may look at the way in which it is given to see if it is a gift coming within the terms of the covenant to settle, but no declarations of intention as to what are to be the consequences can have any effect.

It was contended by Mr. *Abraham* that according to the true construction of this covenant, life annuities are not within it at all, for that the instrument declares no trusts which can apply to such annuities. For the reasons which have been given by the Lord Justice *Cotton* I think that this contention fails. It seems to me, that the omission from this deed of the provision usually inserted in covenants of this kind as to life interests of the wife is immaterial, if there is language left in the deed sufficient for the purpose of dealing with those interests.

Then Mr. *Abraham* contends that this annuity does not fall

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within the covenant because the re-settlement shews that the father did not intend the covenant to apply to it. Now this intention can only be gathered from the terms of the re-settlement itself, and although I quite admit it not to be likely that the framer of the re-settlement intended the annuity to fall within the covenant, still I do not find anything which distinctly shews a contrary intention. But I think that it is not a question of intention at all; the question, as it appears to me, only is, not whether the father intended to give it so as to come within the covenant, but whether he did in fact give it in such a way as to come within the covenant. *In re Mainwaring's Settlement* (1) decides no more than this: that property does not fall within the covenant to settle after-acquired property if it is given in such a way that it will not fit in with the trusts of the settlement. It is perfectly true that language is used by Sir *W. P. Wood* at the bottom of page 495 which would lead one to suppose that he thought that the intention of the parties who gave could be a governing consideration. That, however, is not I think the basis of his judgment, and if it was, I should venture with the greatest respect to say that in my opinion it could not be supported.

FRY, L.J.:—

The question in this case is whether an annuity given by a father to his daughter during the joint lives of the daughter and her husband falls within the scope of the covenant to settle her after-acquired property. Mr. *Abraham* discussed two points arising out of that inquiry. The first is one of considerable moment, viz., whether the intention of the donor can operate to take a gift out of the operation of the covenant, when, but for such expression of intention, the gift would have fallen within its operation. He has pressed upon us the case of *In re Mainwaring's Settlement* (1), as determining that point in his favour. Now on principle it appears to me to be impossible that that question can be answered in the affirmative. It seems to me that we must inquire first what is the construction of the covenant to settle, next, what is the gift, and that if the gift comes within the scope of the covenant then no expression of intention on the

(1) Law Rep. 2 Eq. 487.

part of the donor can take it out of the operation of the covenant. In construing the gift we must consider what is the subject-matter of the gift, and what are the limitations subject to which it is made, and if it is found that those limitations are inconsistent with the limitations of the covenant to settle, then the Court may well conclude that the subject-matter of the gift does not come within the operation of the covenant. The intention of the donor of the gift cannot, in my judgment, be regarded, except so far as it bears on the nature of the gift he has made.

The same question came for consideration in the case of *In re Allnutt* (1). Mr. Justice *Chitty* there cites the observation of Vice-Chancellor *Wood* to this effect: "'She therefore,'" that is the donor, "'means to say, I do not intend this portion of my daughter's property to be comprised in her settlement; I intend that she shall take it upon this express condition, that it shall not be settled.'" Upon that Mr. Justice *Chitty* made this observation: "I respectfully dissent from that proposition, and I think I ought on principle to dissent from it, if it is meant that I am to regard the testator's intention when it is expressed in some manner which is not legally binding. Taking the whole judgment together I think the Vice-Chancellor intended to decide, as a question of construction of the will, that the gift was such that it did not fall within the scope of the covenant, in other words, that it did not fit the covenant. That may be treated as a question simply of construction of the will, and if so, of course the decision does not bind me in any way." In those observations of Mr. Justice *Chitty* I entirely concur.

Then there arises the second question, which is, whether the covenant to settle operates upon the gift so made? The general words "all the personal estate of which the said *Elizabeth Empson Lister* shall at any time during the said intended coverture become possessed of by gift or any other means whatsoever," as it appears to me, properly include an annuity of this kind. But the matter does not rest there, because the subsequent exception of life annuities from the trust for conversion shews that an annuity was intended to be included within the operation of the covenant. Then comes the further question: Are the

(1) 22 Ch. D. 275, 279.

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trusts declared in the covenant so inconsistent with the nature of the annuity given by the deed of re-settlement that it is clear the covenant cannot include it? The covenant might have been more artistically drawn, but I think, as has been pointed out by Lord Justice *Cotton,* that the words are sufficient to declare trusts of this annuity. There is an express declaration that all the personal estate shall be held by the trustees upon trust during the joint lives of Mr. and Mrs. *Spooner* to pay to them the annual profits thereof in equal half shares. It appears to me that the annual produce of the annuity is the sum that the annuity produces in each year, and although more appropriate words might have been used, those are quite adequate to include the instalments of the annuity.

Solicitors for Appellants: *Lousada & Emanuel.*
Solicitors for Plaintiffs: *Williamson, Hill, & Co.*
Solicitors for Mrs. *Spooner: Mead & Daubeny.*

H. C. J.

In re GARE'S PATENT.

M. R.
1884
April 5.

Specification of Patent — Clerical Error — Amendment — Jurisdiction of the Master of the Rolls — Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 18.

The 18th section of the *Patents, Designs, and Trade-marks Act*, 1883, does not affect the jurisdiction of the Master of the Rolls to allow an amendment in a patent specification which has been filed under sects. 27 and 28 of the *Patent Law Amendment Act* of 1852, or has otherwise become a record. So long as it is in the Patent Office, and before the patent is sealed, any one applying for amendment must proceed under sect. 18 of the Act of 1883.

THIS was a petition presented to the Master of the Rolls as keeper of the records by *Thomas Gare*, the patentee under letters patent dated the 2nd of November, 1882, No. 5229, praying that certain clerical errors in his provisional specification lodged on his application for the patent, and in the complete specification filed under the letters patent, might be corrected. The errors were that the technical word "gumthus" had by mistake been divided into the two words "gum thus," which was alleged to make the provisional specification and the complete specification unintelligible. The petition was amended by asking that the orthographical mistakes of "patrolium" and "petrolium," instead of "petroleum," "ingreadients," and "useing," might also be corrected. The specifications had been filed.

The petition was served on the Attorney-General, who did not appear on it, but sent a communication to the Master of the Rolls stating that he did not object to the corrections proposed, and did not think it necessary to appear, but suggesting that the application should have been made to the Comptroller of Patents under sect. 18 of the *Patents, Designs, and Trade-marks Act*, 1883.

The facts were proved by affidavit.

1884. March 5. *Aston*, Q.C., and *Lawson*, for the Petitioner, referred to *In re Johnson's Patent* (1), and submitted that as there was nothing in the Act of 1883 taking away the jurisdiction of

(1) 5 Ch. D. 503.

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the Master of the Rolls as keeper of the records the amendment asked for might still be made under that jurisdiction, and, further, that since the specifications in question had been filed and the patent sealed, an amendment of this nature could not be made by the Comptroller.

1884. April 5. The following written judgment signed by BRETT, M.R., was handed out:—

The Master of the Rolls is of opinion that sect. 18 of the *Patents, Designs, and Trade-marks Act*, 1883, does not affect the power of the Master of the Rolls to allow amendments in a patent specification filed in pursuance of sects. 27 and 28 of the *Patent Law Amendment Act* of 1852, or which is otherwise to be considered as a record under the authority of the Master of the Rolls.

So long as the specification is in the Patent Office, and before the patent is sealed, the Master of the Rolls considers that the proceedings of sect. 18 should be the only proceedings taken by any one asking for amendment within that section.

In the present case the specification has been filed, although it has not in fact left the Patent Office.

The Master of the Rolls having considered the amended petition is of opinion that the amendments asked for are mere verbal corrections not in any way altering the meaning of the specification, and therefore allows them.

Solicitor for Petitioner: *J. Henry Johnson.*

H. C. J.

LONDON FINANCIAL ASSOCIATION *v.* KELK.

V.-C. B.

1883
Nov. 20, 21, 22, 27, 28, 29; Dec. 4, 5, 6, 11, 12, 13, 18, 19, 20.

1884
Jan. 15, 16, 17, 21, 22, 23, 24, 28, 29, 30, 31; Feb. 4, 5, 6; March 8.

[1879 L. 277.]

Company—Memorandum and Articles of Association—Ultrà Vires—Liability of Directors—Acquiescence—Ratification.

The objects of a company were stated by the memorandum of association to be "the carrying on for profit or gain the trades or businesses of discounters, lenders of, and dealers in money" . . . "the advancing and lending of money on real, personal, or mixed securities . . . on stocks and shares of railway, canal, dock, and other joint stock companies, corporations, associations, and other undertakings of whatever nature or description . . . on ships, goods, merchandize, materials, produce, works, plant, chattels, debts, *choses in action*, articles and effects, or on any other property of whatever kind and description . . . in the making of purchases, investments, sales, or any other dealings of or in any of the above-named articles or securities . . . and the entering into and carrying on of any monetary and financial arrangements or operations, and the doing of all matters and things which may appear to the company to be incident or conducive to the objects aforesaid, or any of them":—

Held, that the entering into an agreement to purchase "on joint account" with two other parties, for £310,000, an estate, on which one of the other parties (*K. & L.*) undertook to finish a building (the *Alexandra Palace*), grounds, race-course and stand, lodges, roads, terraces, and drainage, for a sum not exceeding £200,000, the company undertaking to float another (the *Alexandra Palace*) company for the purpose of acquiring materials and building the palace, was a transaction within the powers of the company:

Held, further, that such an agreement did not constitute a partnership between the three parties to it.

Observations on the effect of acquiescence by shareholders in the contracts and acts of their directors.

THE Plaintiffs, the *London Financial Association, Limited*, were incorporated in May, 1863, with a nominal capital of £1,000,000 in 20,000 shares of £50 each, afterwards raised to £2,000,000 by the issue of 20,000 further shares of £50 each.

The following is an extract from the memorandum of association:—

"The objects for which the company is established are: the carrying on for profit or gain in *London* and elsewhere the trades

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or businesses of discounters, lenders of, and dealers in, and exchangers of, money; the receiving of deposits of money whether at interest or otherwise; the advancing and lending of money on real, personal, or mixed securities, on cash, credit, or other accounts, on policies, bonds, debentures, bills of exchange, promissory notes, letters of credit, or other obligations, on rates or tolls of trustees or commissioners of public docks, harbours, canals, or other public works, or of any other body of persons, whether corporate or otherwise, duly authorized to make, levy, or collect rates or tolls under the provisions of any local or general Act of Parliament; the discounting bills of exchange, promissory notes, bonds, and other securities and obligations; the advancing of money on the deposit of title-deeds, securities, contracts, agreements, concessions, covenants, bills of sale, bills of lading, delivery orders, warehousemen's and wharfinger's certificates and notes, dock warrants, or other mercantile documents, symbols or tokens; on bullion, government or public stocks or funds, whether British, colonial, or foreign, on Exchequer and navy bills, *Bank* and *East India* stock, stocks and shares of bankers, banking companies, insurance companies, railway, canal, dock, and other joint stock companies, corporations, associations, and other undertakings of whatever nature or description, and whether British, colonial, or foreign; on ships, goods, merchandise, materials, produce, works, plant, chattels, debts, *choses in action*, articles, and effects, and on any other property of whatever kind and description; the drawing and indorsing of bills of exchange on persons, associations, or companies, in foreign countries or any of Her Majesty's colonies; the indorsing of bills of exchange drawn or accepted by persons, associations, or companies, in foreign countries or any of Her Majesty's colonies; the borrowing of moneys on the promissory notes or bills of exchange of the company, the contracting for, arranging, negotiating, and otherwise carrying out of, and the subscribing for, and contributing to, loans to any Government, country, state, or power, whether British, colonial or foreign; the making of purchases, investments, sales, or any other dealings of or in any of the above-named articles or securities; the doing of all such acts and things as may be necessary or convenient for realizing and obtaining the full benefit of all securities or

property on which any moneys of the said company may be advanced; the carrying on of any business, work, or operation, and carrying out of any contracts, execution of any works, or performance of any agreements, on, or in respect of, or in reference to, which, any moneys of the company may have been advanced, or agreed to be advanced, and the entering into and carrying on of any monetary or financial arrangements and operations, and the doing of all matters and things which may appear to the company to be incident or conducive to the objects aforesaid or any of them."

Amongst the articles of association the following were especially referred to in the arguments and judgment:—

"Interpretation.

"In the interpretation of these presents the following words and expressions shall have the following meaning:—

"'These presents' means and includes the memorandum of association, and the regulations, and the articles of association of the company from time to time.

Art. 2. "'The property' means the lands, houses, buildings, hereditaments, moneys, stocks, funds, securities, deeds, documents, goods, merchandize, materials, chattels, effects, *choses in action*, and other real and personal property from time to time of the company, or to, in, or upon which the company may from time to time have any right, title, interest, claim, lien, charge, or demand."

"Business.

Art. 5. "The business of the company shall include the trades and businesses, monetary and financial operations, and objects mentioned in the memorandum of association of the company; the management, use, employment, and disposal of the property of the company; the management, employment, and application of the capital and other moneys of the company; and all contracts, arrangements, acts, operations, and other matters incident to, or connected with, or conducive to, the trades, businesses, operations, objects and purposes aforesaid, or any of them.

Art. 6. "The business of the company shall be carried on by or under the management or direction of the board."

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"Borrowing.

Art. 16. "The board may from time to time borrow on mortgage of the property or any part thereof, or on bonds or debentures . . . ."

"Purchasing, Selling, Leasing, and Renting of Lands, Houses, &c.

Art. 19. "The board may from time to time purchase, rent, or accept a lease of, any lands, houses, buildings, structures, hereditaments, or property, the possession, use, or occupation of which the board shall think convenient for the business of or advantageous to the company, upon such terms, for such period or periods, and for such estates or interests therein as the board shall think fit, and the board may from time to time sell, exchange, let, or underlet, at such prices, upon such terms, and subject to such conditions as the board shall approve of, such of the said lands, houses, buildings, structures, hereditaments, and property as for the time being shall not be required to be retained or occupied or used by the company."

"Application of Capital.

Art. 21. "The capital may be applied or employed by the board . . . . in carrying on the business of the company, and making advances or loans of money in accordance with the memorandum of association of the company, and otherwise carrying out the objects of the company, and in or for the purchase, improvement, or repair of such lands, houses, buildings, structures, hereditaments, and property, as the company is by these presents authorized to purchase or rent, and in payment of any premium on any lease, or renewal of a lease which the company shall accept, and in or towards the erection, construction, renewal, or repair of any offices, buildings, structures, and fixtures which the board may think necessary, or convenient for the business, or purposes, or objects of the company, and in or towards the discharge of such other expenses or outlay of, and incidental to, or connected with the company, or its property, business, objects or purposes, as in the judgment of the board shall be properly chargeable against capital, and in or towards the paying off money borrowed by the company, or the board, or the making additions to the reserved fund of the company."

Art. 24. "All capital and all moneys carried to the reserved fund, and all other moneys of the company not immediately applicable for any payment to be made by the company, or not required as working capital or otherwise for or in the current business or operations of the company, may be invested by the board on such government or other securities in the name of the company, or in the names or name of such trustees or trustee, or otherwise, as the board from time to time shall think proper; and the board may from time to time vary such investments as they shall think proper."

Powers and Duties of the Board of Directors.

Art. 130 . . .

"(H) The making and authorizing the managers of the company to make advances and loans of money out of the moneys of the company to landowners, merchants, manufacturers, traders, contractors, and other persons, on such legal and equitable mortgages, bills, bonds, covenants, agreements, or other securities or property, and at such rates of interest and on such terms as the board shall from time to time think proper.

"(J) The foreclosing or buying up, or otherwise acquiring on such terms and in such manner as the board shall think fit, the equity of redemption of any real or personal property, *choses in action*, chattels or things on which any moneys of the company may be secured, advanced, or lent, or on which the company may have any lien or charge."

Art. 132. "Every account of the board when audited and approved by a general meeting, shall be conclusive except as regards any error discovered therein within two months next after such approval thereof.

Art. 133. "Whenever any such error shall be discovered within that period, the accounts shall be forthwith corrected, and thenceforth be conclusive."

On the 26th of June, 1863, a company was registered called the *Alexandra Park Company*, with a nominal capital of £500,000, for the purpose of acquiring an estate at *Muswell Hill, Middlesex*, and erecting thereon the building which was subsequently known as the *Alexandra Palace*.

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The company was unsuccessful, and in the month of March, 1865, was ordered to be wound up.

In August, 1865, the Plaintiff Association, the Defendant *Michael Emmanuel Rodocanachi*, then one of the directors of the Plaintiff Association, and the firm of *Kelk & Lucas*, consisting of the Defendants Sir *John Kelk*, Bart., *Charles Thomas Lucas*, and *Thomas Lucas*, agreed with *William Quilter*, the official liquidator of the *Park Company*, for the purchase of the company's property; and the following agreement was entered into:

"*Alexandra Park* Estate.

"The *London Financial Association, Limited*, Mr. *Rodocanachi*, and Messrs. *Kelk & Lucas* agree as follows:—

"1. To purchase on joint account the *Alexandra Park Company's* estate, with all the property thereon, for the sum of £310,000, each paying one-third of the cost, and each having one-third interest in it; it being understood that the mortgage shall remain if it can be satisfactorily arranged; and at once forming a limited company of which each will furnish an equal number of directors, and the chairman of the *London Financial Association, Limited*, to be the umpire, and that the company to be (*sic*) with a capital of £30,000 in £100 shares, and shall issue debentures at £6 per cent., for three or five years for balance required, and to deal with the entire property unless otherwise decided by mutual consent.

"2. Messrs. *Kelk & Lucas* bind themselves to finish the Palace and grounds, racecourse, and stand, lay on water supply, lodges, roads, terraces, drainage, and all as per plans approved, for a sum not exceeding £200,000, including payment of interest at £5 per cent. during construction on all the money found by the *London Financial Association, Limited*, Mr. *Rodocanachi*, and Messrs. *Kelk & Lucas*, or the public.

"3. The works and materials as they stand should be valued at £100,000, making a total capital of £300,000, for the second company, limited, to be formed for the purpose of acquiring the same materials and building the palace, &c., &c. (the) about 181 acres of park being leased to the *Park Company* from the first company at a ground rent of £10,000 per annum for 999 years,

the grove excepted; and that each one of the parties named take one-third of the shares of the second company, and that the entire number of shares of the second company shall be offered to the public by the *London Financial Association, Limited*, and any shares applied for by the public to be deducted *pro ratâ* from the entire number. The *London Financial Association, Limited*, being hereby empowered to do all that may be required to float the company, and each binding himself not to deal directly or indirectly in the shares for six months except for the mutual benefit of all.

"4. That the *London Financial Association, Limited*, receive a commission of £2 per cent. on the £310,000 for their services. That a legal agreement be prepared to carry this arrangement into effect, and in case of any dispute that the matter be settled by arbitration.

"Dated this 3rd day of August, 1865.

"For the *London Financial Association, Limited.*

(Signed) "*A. S. Wildy*, Manager.
"*M. E. Rodocanachi.*
"*Kelk & Lucas.*"

The following persons (having been appointed directors of the Plaintiff Association on the 29th of April, 1863) were directors on the 3rd of August, 1865, the date of the above contract; the Defendant *John Borradaile; James Fraser*, who died on the 5th of March, 1872, and whose representatives *Ann* and *George John Fraser* were made Defendants; *John Hackblock*, chairman of the Board, who ceased to be a director on the 19th of April, 1872, and died on the 24th of May, 1877, and whose representatives *William Henry Hackblock*, *Clifton Whiting*, and *Robert George Graham* were made Defendants; and the Defendants *Henry Paull*, *William Rennie*, the above-mentioned *M. E. Rodocanachi*, and *William Turquand*. Another Defendant, *John Edward Campbell Koch*, was also appointed director on the 29th of April, 1863, but ceased to be a director on the 18th of May, 1863. During the above period he was manager. On the 1st of February, 1864, he was re-elected director, and again ceased to be a director on the 11th of July, 1866. On the 28th of July, 1875, he was again re-elected manager, and

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ceased to be manager and director on the 27th of March, 1878. The Defendant *Borradaile* ceased to be a director on the 11th of May, 1878; the Defendant *Paull* ceased to be a director on the 5th of August, 1868; the Defendant *Rennie* on the 29th of January, 1868; the Defendant *Rodocanachi* on the 29th of July, 1868; and the Defendant *Turquand* on the 23rd of May, 1866. Another Defendant *Edward Ehret Dyson* was appointed director on the 29th of January, 1868, and ceased to be a director on the 6th of September, 1871; the Defendant *Paul Margetson* was appointed on the 6th of March, 1872, and ceased on the 9th of April, 1878, to be a director; and the Defendant *Grüning* was appointed on the 10th of April, 1872, and ceased on the 2nd of August, 1876, to be a director. Since the institution of this suit the Defendant *Grüning* had died, insolvent.

In pursuance of the above agreement of the 3rd of August, 1865, two companies were formed, one the *Muswell Hill Estate Company*, with a nominal capital of £60,000 in 600 shares of £100 each, for the purchase of the *Park Company's* estate; the other the *Alexandra Palace Company*, with a nominal capital of £400,000 in 20,000 shares of £20 each, for the purchase of the materials and works. The *Estate Company* was registered on the 19th of October, 1865, and the *Palace Company* on the 13th of September, 1866.

Of the 600 *Estate Company's* shares, 200 were taken by each of the three parties to the agreement of the 3rd of August, 1865, those taken by the Plaintiff Association being held as follows: five shares by *John Hackblock*, five by the Defendant *Koch*, who was a director but not then manager, five by *Augustus Samuel Wildy*, who was manager of the Association at the time, and 185 were entered in the name of the Association itself. Of the *Estate Company*, the Defendants Sir *J. Kelk*, *C. T. Lucas*, *John Hackblock*, *Rodocanachi*, *Koch*, *Borradaile*, and *Grüning* and *A. S. Wildy*, and eight other persons, not Defendants, acted as a committee of management down to dates varying from July, 1866, to August, 1874. Of this committee, which first sat on the 18th of October, 1865, the Defendants Sir *J. Kelk*, *C. T. Lucas*, *John Hackblock*, *Rodocanachi*, *Koch* and *A. S. Wildy*, and another person, not a Defendant, were the original members.

It having been originally intended that the nominal capital of

the *Palace Company* should be £300,000, of which the sum of £100,000 was estimated to represent the purchase-money for the materials—the share of the Plaintiff Association in the remaining £200,000 was reckoned at £66,666, to provide for which 3334 shares of the *Palace Company* were standing in the name of the Association when the *Palace Company* was registered. From and after the 12th of December, 1865, and before the date of registration on the 13th of September, 1866, the Defendant *Paull* and four other persons, not Defendants, acted as directors of the *Palace Company;* and after the date of the registration, at various dates, the Defendant *Paull*, *A. S. Wildy*, and the Defendants *Dyson*, *John Hackblock*, *Thomas Lucas*, *Borradaile*, *C. T. Lucas*, *Grüning* and *Koch*, with others, not Defendants, remained and became directors of the *Palace Company* until various dates prior to the order for the winding-up of that company. In the result, the state of share capital of the *Palace Company* on the 10th of December, 1866, was, that each of the three parties to the agreement of the 3rd of August, 1865, held £33,340 worth of £6 per cent. preference shares, and £85,000 worth of ordinary shares in the company.

The agreement of the 3rd of August, 1865, was followed by an agreement dated the 8th of August, 1865, between *William Quilter*, the liquidator of the *Park Company* of the one part, and the Defendants *Kelk & Lucas*, and *Rodocanachi*, and *Wildy* of the other part, for the purchase of the *Muswell Hill* estate for the sum of £310,000, of which £205,000 was to be paid to the liquidator by instalments, and £105,000 was to remain on mortgage. The instalments were all paid from time to time to the liquidator by the three parties to the agreement of the 3rd of August, 1865, in equal shares.

In December, 1865, certain mortgagees of the *Muswell Hill* estate became desirous of having some arrangement made for securing and satisfying the amount due to them, and by an agreement dated the 18th of December, 1865, the three parties to the agreement of the 3rd of August entered into an agreement with Messrs. *Barclay*, *Bevan & Co.*, whereby, part of the existing mortgage debt having been paid off, and part transferred, and a further advance having been obtained, the *Muswell Hill*

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estate was agreed to be mortgaged to *Barclay, Bevan & Co.* for £105,000 and interest. The mortgage itself was executed on the 7th of May, 1867. On the same 18th of December, 1865, a resolution was passed by the committee of the *Estate Company* indemnifying the three parties in respect of their last-mentioned undertaking.

In May, 1866, occurred the failure of the house of *Overend, Gurney & Co.*, followed by commercial panic and an almost universal depreciation in market value of the shares of joint stock companies.

On the 16th of July, 1866, the last instalment of purchase-money having been paid, the *Muswell Hill* estate was conveyed by the liquidator of the *Park Estate* to the *Estate Company.*

In April, 1867, the *Estate Company* issued fresh capital. The three parties to the agreement of the 3rd of August, 1865, in return for the purchase-money of £205,000 paid by them as aforesaid, received fully paid-up shares of the *Estate Company* to represent £60,000 cash, and fully paid-up shares of the *Palace Company* to represent £100,000 cash advanced for the purchase of materials from the *Park Company.* Thus a sum of £45,000 was unprovided for, to cover which, and further sums amounting together to £54,600, out of newly created capital to the amount of £60,000, paid-up shares to the amount of £54,600 were issued to the above named three parties.

The same three parties, finding that the shares of the *Estate* and *Palace Companies* were not taken up by the public, and that the debentures of the same companies were unsaleable, advanced from time to time in equal proportions large sums towards the completion by the Defendants *Kelk & Lucas* of the *Alexandra Palace.* The amount of expenditure thus incurred or contracted for, amounted in December, 1868, to £430,720 19*s.* 11*d.*

In 1871, the Defendant *Rodocanachi* resolved to retire from the joint undertaking. By an agreement dated the 20th of May, 1871, his share and interest under the contract was conveyed to the Defendants *Kelk & Lucas;* and by another agreement, dated the 5th of June, 1871, Messrs. *Kelk & Lucas* agreed to stand possessed of half of the share thus assigned to them in trust for the Plaintiff Association.

The Plaintiffs and the Defendants *Kelk & Lucas*, being thus entitled in equal shares, continued to make advances in equal moieties towards the completion of the *Palace* and works, down to the 24th of May, 1873, when the *Palace* was opened to the public.

On the 9th of June, 1873, the *Palace* was destroyed by fire, being only partially insured. At this date, the sums advanced by the Plaintiff Association amounted to £239,888 and upwards.

In the latter part of 1873, the Defendants *Kelk & Lucas* tendered for the rebuilding of the *Palace*, and on the 22nd of January, 1874, the directors of the *Palace Company* resolved to accept the tender, which was for £232,000. Further sums were required, to which the Plaintiff Association contributed; and on the 1st of May, 1875, the *Palace* was re-opened.

On the 24th of October, 1876, the *Palace Company* was ordered to be wound up. At the previous half-yearly general meeting of the Plaintiff Association, on the 1st of August, 1876, an angry discussion arose, and the meeting was adjourned to the 7th of November, 1876, and again adjourned to February, 1877.

On the 26th of January, 1877, an extraordinary general meeting of the Plaintiff Association was held, at which a committee of consultation was appointed, and on the 28th of March, 1877, the committee reported in favour of purchasing the *Palace* from the first mortgagees under their power of sale; and the Plaintiff Association accordingly purchased the property for £390,000, and were the owners when the suit was instituted.

The sums expended out of the moneys and assets of the Plaintiff Association in the above transactions amounted to about £375,000. The nominal value of the securities held by them consisted of railway ordinary stock of the *Muswell Hill Estate Company*, £35,000; *Lloyd's* bonds of the same company, £3300; 593 shares of £100 each in the same company, £59,300; 8403 ordinary shares in the *Palace Company* (in liquidation), £169,660; 4538 preference shares in the same, £90,760; 2395 first preference shares, £23,950; bonds of indebtedness, £97,176 3*s.* 1*d.*; B Debentures due 1st of March, 1881, £85,000; total, £364,146 3*s.* 1*d.* It was alleged by the Plaintiffs that all these securities were practically worthless.

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The writ in the action was issued on the 9th of December, 1879, and the claim was for a declaration that the agreement of the 3rd of August, 1865, and the subsequent arrangements carried out by the agreement of the 5th of June, 1871, were not authorized by the memorandum or articles of the Plaintiff Association, and that the same were *ultrà vires* and invalid, and were breaches of trust on the part of the directors for the time being of the Association who entered into or concurred in them, or acted upon or in carrying out the same; that the expenditure of the moneys and assets of the Plaintiff Association expended or contributed pursuant to or under the said agreements, or otherwise in relation to the said joint adventure or speculation, and also the further arrangements made for expending the moneys of the Plaintiff Association in and about the reconstruction of the *Palace* and buildings, were breaches of trust on the part of the directors who entered into the agreements respectively; that such of the Defendants as were directors on the 3rd of August, 1865, personally and such of them as were representatives of directors at that date since deceased to the extent of their estates respectively, were jointly and severally liable to make good to the Plaintiff Association the moneys which had been paid out of the assets of the Plaintiff Association "in pursuance of or in connection with" the said agreements or either of them; and that such of the Defendants as became directors after the two dates respectively were jointly and severally liable for the moneys paid out of the assets of the Plaintiff Association after the fire; also that the Defendants *Kelk & Lucas* were parties to the two first-mentioned agreements with full notice and knowledge that they were *ultrà vires* and breaches of trust, and that the same Defendants were liable to make good to the Plaintiff Association all moneys expended out of the assets of the Plaintiff Association "in pursuance of or in connection with the said agreements" to the extent to which such moneys had been applied in payment to the said Defendants for the construction and completion of the *Palace*, and of the new building and works after the fire; and other subsidiary relief.

The case of the Plaintiffs further was that Messrs. *Kelk & Lucas* had been promoters of the *Park Company*, but this statement was denied, disproved, and withdrawn. The Plaintiffs further alleged

that *Kelk & Lucas*, being creditors of the *Park Company* and holders of their shares to a large amount, induced the directors of the Association and Mr. *Rodocanachi* to join in the purchase of the *Park Company's* property at an overvalue, knowing that the undertaking was beyond the powers of the Association. They further put forward the transaction of the 3rd of August, 1865, as a partnership; and it was a further part of their case that the proceedings of the directors in laying out the moneys of the Association in the building and rebuilding of the *Palace* were concealed from the shareholders. For this latter purpose the half-yearly reports of the Association from 1865 to 1877, were put in. This and the other evidence adduced on this question of fact will be found discussed and summed up in the Vice-Chancellor's judgment.

The defences of the Defendants generally, were, that none of the acts complained of were *ultrà vires*, and that if any of such acts were irregular in form, they were capable of being, and had been, ratified by the shareholders; also that the claims of the Plaintiffs had been barred by the *Statute of Limitations* and by the rules against stale claims.

The defences of Messrs. *Kelk & Lucas*, in addition to the above, were, that (as a matter of fact) they did not induce the Plaintiffs to enter into the agreement of the 3rd of August, 1865; that that agreement did not bind the Plaintiffs to make any subsequent payments, and that the subsequent payments arose out of independent agreements; that the Plaintiffs, for the payments made by them, they having power to hold land, and being justified in making payments for the improvement of their landed property, received full value, and hence could not reclaim repayment from the Defendants *Kelk & Lucas;* that the moneys received by *Kelk & Lucas* were the moneys of the *Palace Company;* and that *Kelk & Lucas* were never under any contract with the Plaintiffs either to build and complete the *Palace* for £200,000, or to rebuild the same—the sum of £200,000 having been inserted in the agreement of the 3rd of August, 1865, as an estimate only; also that if it could be shewn that the Plaintiffs, having full power to hold shares in other companies, had paid moneys in respect of the shares they held in the *Palace Company*, and had thereby enabled

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the *Palace Company* to pay *Kelk & Lucas* such moneys could not be traced, and even if they could be traced, the Defendants *Kelk & Lucas* were not liable to repay such moneys.

Davey, Q.C., *Everitt*, Q.C., *Stirling*, and *H. Burton Buckley*, for the Plaintiffs:—

As to the Defendants, other than *Kelk & Lucas*, the questions are four—first, whether the transactions are beyond the powers of the Association; secondly, what is the position of those directors who actually entered into the agreements and paid away moneys in respect of them; thirdly, as to the position of subsequent directors; and, fourthly, as to the position of representatives of deceased directors.

Upon the true construction of the memorandum the objects of the company were confined to the lending and advancing of money on securities. There is nothing to justify a land-jobbing and building speculation, or the promotion of companies for the purpose of land speculation. An authority to invest in shares does not authorize the promotion of a company: *Joint Stock Discount Company* v. *Brown* (1); and here, the companies were mere puppets—they were only the three parties to the original contract under other names. The transactions complained of were not "monetary or financial arrangements or operations." If they should be construed so to be, these words would include any business in the world, say that of a wine merchant or a shipowner: *Joint Stock Discount Company* v. *Brown*; *Ex parte Liquidators of the British Nation Life Assurance Association* (2); *Ashbury Railway Carriage and Iron Company* v. *Riche* (3); *In re German Date Coffee Company* (4).

The agreement of the 3rd of August, 1865, constituted a partnership between the three parties to it: *Dale* v. *Hamilton* (5).

If this were an action of tort, possibly the doctrine of *actio personalis moritur cum personâ* might apply; but, being an action for a breach of trust, the estates of deceased trustees are liable. The suit is a suit for an equitable debt, due from the deceased

(1) Law Rep. 3 Eq. 139; 8 Eq. 381.
(2) 8 Ch. D. 679.
(3) Law Rep. 7 H. L. 653.
(4) 20 Ch. D. 169.
(5) 5 Hare, 369; S.C. on appeal, 2 Ph. 266.

person at the time of his death. Hence relief is properly prayed against the representatives of deceased directors: *Ex parte Adamson* (1); *Charitable Corporation* v. *Sutton* (2); *Attorney-General* v. *Wilson* (3); *Overend, Gurney Co.* v. *Gurney* (4); *Walsham* v. *Stainton* (5); *Peek* v. *Gurney* (6).

That directors who assent to the adoption of contracts beyond the powers of the company are jointly and severally liable to refund the moneys spent, appears from *Joint Stock Discount Company* v. *Brown* (7).

As to Messrs. *Kelk & Lucas*, whether or not they deny knowledge of the terms of the memorandum, they were and are affected with notice of those terms by law: *Ernest* v. *Nicholls* (8); *Mahony* v. *East Holyford Mining Company* (9); and persons who are implicated in a breach of trust are liable to replace moneys which have come to their hands in consequence of that breach of trust: *Imperial Mercantile Credit Association* v. *Coleman* (10); *Wilson* v. *Moore* (11); *Bridgman* v. *Gill* (12); *Ex parte Kingston* (13); *Zulueta's Claim* (14); *Attorney-General* v. *Compton* (15); *Ex parte Heaton* (16); *Lindley* on Partnership (17); *Hardy* v. *Metropolitan Land and Finance Company* (18); *Ernest* v. *Croysdill* (19).

If two persons are in partnership, one being a trustee, and the trustee makes a secret profit, the co-partner is jointly and severally liable with the trustee to make restitution: *Imperial Mercantile Credit Association* v. *Coleman.*

As to acquiescence, no Statute of Limitations applies to an equitable debt arising out of a breach of trust; and the acquiescence of every shareholder, if obtained, could not be a defence to this action—the acts complained of being *ultrà vires* not merely of the directors, but of the company: *Ashbury Railway Carriage and Iron Company* v. *Riche* (20); *Zulueta's Claim*; *Flitcroft's Case* (21).

(1) 8 Ch. D. 807.
(2) 2 Atk. 400.
(3) Cr. & Ph. 1.
(4) Law Rep. 4 Ch. 701.
(5) 1 D. J. & S. 678.
(6) Law Rep. 6 H. L. 377, 392.
(7) Ibid. 8 Eq. 381, 399.
(8) 6 H. L. C. 401.
(9) Law Rep. 7 H. L. 869, 873.
(10) Ibid. 6 H. L. 189.
(11) 1 My. & K. 337.
(12) 24 Beav. 302.
(13) Law Rep. 6 Ch. 632.
(14) Ibid. 5 Ch. 444.
(15) 1 Y. & C. Ch. 417.
(16) Buck, 386.
(17) 4th Ed. p. 312.
(18) Law Rep. 7 Ch. 427.
(19) 2 D. F. & J. 175.
(20) Law Rep. 7 H. L. 653.
(21) 21 Ch. D. 519.

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Acquiescence, to be of any avail, must be with full knowledge, and here, as a matter of fact, the shareholders were kept in ignorance. As to the general meetings—a general meeting not specially called for the purpose, cannot bind the general body of shareholders: *Erlanger* v. *New Sombrero Phosphate Company* (1); *Ashbury Railway Carriage and Iron Company* v. *Riche* (2); *Life Association of Scotland* v. *Siddal* (3); *Spackman* v. *Evans* (4); *Phosphate of Lime Company* v. *Green* (5).

That the defendants have no right to call upon the plaintiffs to point out to them what part of the evidence affects each of them respectively, was laid down in *In re Mutual Society* (6).

As to the right of Plaintiffs to sue notwithstanding their purchase of the property, on the principle that a trustee whose money has been invested on an improper or insufficient security, may retain the security and yet sue for the difference, we rely upon *Mant* v. *Leith* (7); *Ex parte Norris* (8).

Charles Russell, Q.C., *Crossley*, Q.C., *Edward Beaumont*, and *G. S. Barnes*, for the Defendants *Kelk & Lucas*:—

Our counter-propositions to the Plaintiff's claim are—that the agreement of the 3rd of August, 1865, was not *ultrà vires;* that the payments made after that date were not *ultrà vires;* and that, even if the directors mistook the extent of their powers, they, not being guilty of negligence, are not liable to the shareholders. Arguing for ourselves, we do not contend that, if the contracts were *ultrà vires*, the acts of the shareholders in this case amounted, or that any acts of the shareholders would have amounted, to ratification. We do not submit that any subsequent acts would ratify a contract originally not binding or illegal; but we say that there was acquiescence, and there was election on the part of the shareholders.

Upon the construction of the memorandum, the words "the making of purchases, investments, sales, or any other dealings of or in any of the above-named articles or securities," empower the company to buy and invest in any of the things on which they could

(1) 3 App. Cas. 1218.
(2) Law Rep. 7 H. L. 653.
(3) 3 D. F. & J. 58, 74.
(4) Law Rep. 3 H. L. 171, 194.
(5) Law Rep. 7 C. P. 43.
(6) 22 Ch. D. 714.
(7) 15 Beav. 524.
(8) Law Rep. 4 Ch. 280.

advance and lend money: which things include land. By the clause "the doing of all such acts and things as may be necessary or convenient for realizing and obtaining the full benefit of all securities or property on which any money of the company may be advanced" would justify the after payments. This is strengthened by the words in the following clause, "advanced, or agreed to be advanced."

The contract of the 3rd of August, 1865, was a joint purchase of property by three persons. It did not contemplate the contribution of outlay in the improvement and completion of the property purchased. That was to have been done by the *Estate* and *Palace Companies*. Such a purchase was within the powers expressed in the memorandum. It was not a partnership, as in *Dale* v. *Hamilton* (1); it was a co-ownership: *Lindley* on Partnership (2).

The extent to which directors may go in managing their business is illustrated by *James*, L.J., in *Attorney-General* v. *Great Eastern Railway Company* (3); a case which afterwards went to the House of Lords (4); and that an amplification of powers already given is to have effect appears from *In re Phœnix Bessemer Steel Company* (5); *Ex parte Booker* (6). But supposing the contracts to have been *ultrà vires*, there is no evidence that the directors knew them to be so. On the other hand, there is evidence that they believed they possessed these powers, for they assisted in floating a number of companies similar to these. For an honest mistake of judgment directors are not liable; and directors who are ignorant of an improper application of funds of a company by their co-directors are not liable: *Land Credit Company of Ireland* v. *Lord Fermoy* (7); *Joint Stock Discount Company* v. *Brown* (8). In *Marzetti's Case* (9) the distinction is pointed out between directors and trustees strictly so called. In *Gray* v. *Lewis* and *Parker* v. *Lewis* (10) the transaction complained of was described as "a sham, calculated and intended to deceive." In

(1) 5 Hare, 369; S. C. on appeal, 2 Ph. 266.
(2) 4th Ed. p. 48.
(3) 11 Ch. D. 449, 480.
(4) 5 App. Cas. 473.
(5) 44 L. J. (Ch.) 683.
(6) 14 Ch. D. 317.
(7) Law Rep. 8 Eq. 7; 5 Ch. 763.
(8) Ibid. 381.
(9) 28 W. R. 541.
(10) Law Rep. 8 Ch. 1035, 1053–1057.

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In re National Funds Assurance Company (1) the decision went on the ground that the directors had not acted *bonâ fide*. So in *Fliteroft's Case* (2) there was an admitted misapplication.

Instances where directors acting under an honest mistake as to their powers have been protected are *In re German Mining Company* (3); *Pickering* v. *Stephenson* (4); *Marzetti's Case* (5); *Scott* v. *Depeyster* (6); *Hodges* v. *New England Screw Company* (7).

Coming to the particular case of Messrs. *Kelk & Lucas*, who were outside contractors—it has been overlooked that these are contracts executed—not executory: *Ernest* v. *Nicholls* (8); *Ashbury Railway Carriage and Iron Company* v. *Riche* (9). Supposing for the moment that this company had no power (though they had such power, in fact) to buy a ship, and that having bought a ship and paid for it, the ship became lost or burnt, it is not arguable that fourteen years afterwards new shareholders could recover from the sellers of the ship the amount of the loss sustained: *Parish* v. *Wheeler* (10).

Even if the original contract was invalid, it does not follow that all the subsequent payments were tainted with the original infirmity.

That no acquiescence can amount to ratification of a contract which a company has no power to make appears from *Ashbury Railway Carriage and Iron Company* v. *Riche*; but at this period of time the Court will not undo these contracts; considering the knowledge which the shareholders obtained through committees and agents of their own body: *Spackman* v. *Evans* (11); their acquiescence, and the change of circumstances, especially after the fire: *European Assurance Society's Arbitration* (12).

Sir *H. Giffard*, Q.C., *Marten*, Q.C., and *Speed*, for the Defendant *Borradaile*:—

The question is solely one of the construction of the memo-

(1) 10 Ch. D. 118.
(2) 21 Ch. D. 519.
(3) 4 D. M. & G. 19.
(4) Law Rep. 14 Eq. 322.
(5) 28 W. R. 541.
(6) Edwards Rep. Ch. Cas. of State of New York, 513.
(7) 1 Rhode Island Rep. 312.
(8) 6 H. L. C. 401.
(9) Law Rep. 7 H. L. 653.
(10) 8 Smith's Rep. of Court of Appeal of New York, 494.
(11) Law Rep. 3 H. L. 171.
(12) 17 Sol. J. 403.

randum of association, no direct charges of fraud having been made, and there being no facts in dispute. If the present was not "a financial or monetary operation," it would be difficult to say what could be such an operation. The above-named "articles or securities" comprise "real, personal, or mixed" securities; and this transaction was an "investment;" the Plaintiff Association were never owners of this property—the owners were the *Estate Company*, and when it is said that the *Estate* and *Palace Companies* were mere puppets, that involves the contention that identity of individual corporators prevents the independent existence of separate corporations. *Flitcroft's Case* (1) turned upon its own peculiar circumstances. In this case the acts of the directors would be supported, on the principle that an agent, having ambiguous instructions given to him, is justified in acting on his own *bonâ fide* construction of the instructions: *Ireland* v. *Livingston* (2). In *Ashbury Railway Carriage and Iron Company* v. *Riche* (3) the decision was arrived at after great diversity of opinion, and after all turned only upon the construction of the phrase "general contractors."

The case has been argued as if want of power in the constitution of a company to do a thing amounted to a parliamentary injunction not to do that thing. Want of power in a company to enter into a contract does not imply inability on the part of the shareholders to release to the directors a right of action arising out of their having entered into an unauthorized contract. The contract of the 3rd of August, 1865, did not constitute a partnership; the Plaintiff Company were not carrying on a business, were not keeping up a place of entertainment. The directors were agents rather than trustees: *Overend, Gurney & Co.* v. *Gibb* (4); *Smith* v. *Anderson* (5); *In re Forest of Dean Coal Mining Company* (6); *Land Credit Company of Ireland* v. *Lord Fermoy* (7); *Marzetti's Case* (8); *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (9).

In like manner charity trustees who have applied moneys

(1) 21 Ch. D. 519.
(2) Law Rep. 5 H. L. 395.
(3) Ibid. 7 H. L. 653.
(4) Ibid. 5 H. L. 480.
(5) 15 Ch. D. 247.
(6) 10 Ch. D. 450.
(7) Law Rep. 8 Eq. 7; 5 Ch. 762.
(8) 28 W. R. 541.
(9) 23 Ch. D. 1, 12.

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improperly, but nevertheless to public purposes, acting under honest mistake, will not be held liable to refund: *Attorney-General* v. *Corporation of Exeter* (1); *Attorney-General* v. *Wax Chandlers' Company* (2); *Attorney-General* v. *Dean and Canons of Christ Church* (3); *Attorney-General* v. *Rigby* (4).

That acquiescence will be a bar to a claim of this kind, though the original contract was *ultrà vires*, is shewn by *Gray* v. *Chaplin* (5); *Erlanger* v. *New Sombrero Phosphate Company* (6); *Gregory* v. *Patchett* (7); *Brotherhood's Case* (8); *Gray* v. *Lewis* (9).

The Plaintiffs in this case are the company suing in respect of property which they have already got, who have adopted the acts of the directors in getting it, and who are seeking to have payment to them of money already received: *City of Glasgow Bank* v. *Mackinnon* (10).

Rigby, Q.C., and *Ingle Joyce*, for the Defendant *Paull* and the executors of *John Hackblock*:—

The words "these presents" in the interpretation clause embody both the memorandum and the articles, and then the word "property" is made to mean "lands, houses, buildings, hereditaments, and other real and personal property." The company are empowered to have, not merely use and occupation, but "possession" of property which may be "advantageous to the company;" the capital may be employed in the purchase of such lands, houses, buildings, and property as the company are "by these presents" authorized to purchase, and in or towards the erection of any "buildings and structures which the board may think necessary or convenient for the business, or purposes, or objects of the company." These words cannot be restricted to the business offices of the company. Then by sub-sect. J of art. 130 the directors have power to buy "the equity of redemption of any real or personal property," no doubt for the purposes of gain, but

(1) 2 Russ. 45.
(2) Law Rep. 6 H. L. 1.
(3) 2 Russ. 321.
(4) 3 P. Wms. 145.
(5) 2 Russ. 126.
(6) 3 App. Cas. 1218.
(7) 33 Beav. 595.
(8) 31 Beav. 365; 4 D. F. & J. 566, 580.
(9) Law Rep. 8 Ch. 1035.
(10) 19 Sc. L. R. 278.

at their discretion. The word "stock-in-trade" in sub-sect. S of art. 130 shews that the business of money-lending was not to be the sole business of the company.

The memorandum of association, when closely examined, shews that amongst the objects of the company was that of advancing money on the security of land.

Macnaghten, Q.C., *Davenport*, and *Cunliffe*, for the Defendant *Rennie*.

The *Solicitor-General* (Sir *F. Herschell*), *Romer*, Q.C., and *Northmore Lawrence*, for the Defendant *Rodocanachi*:—

To call the agreement of the 3rd of August, 1865, a partnership is an abuse of terms. Would it have authorized any one of the parties to make a contract, to have accepted a bill, even, which would have bound the others? Could any two of them have prevented the third from disposing of his share? If three persons buy a house and contribute £2000 towards furnishing it, does that make them partners?

The contract was not *ultrà vires*. It was "a financial operation." Such was the view expressed by Mr. Justice *Fry* in *In re Alexandra Palace Company* (1), where he says: "Practically the" (*Palace*) "*Company* was, to use a common expression, 'financed' by *Kelk & Lucas* and the *London Financial Association*, who seem to have been interested in it substantially in equal moieties," as was true at the time of which the learned Judge was speaking, when Mr. *Rodocanachi* had retired.

The case made by the Plaintiffs is that the agreement was *ultrà vires*, and yet in the same breath, they set it up as a partnership. It was argued that, whilst it cannot be denied the Association had power to invest in shares of another company, yet that the Association had no power to create another company for the purpose of taking shares. The case of *Joint Stock Discount Company* v. *Brown* (2) is not an authority for any such proposition. If the financial crisis had not intervened, and the public had taken up shares in the two companies, no one would have dreamt of calling them puppet companies. What difference can arise from the circumstance that the shareholders happened to be few? Whether

(1) 21 Ch. D. 149, 157. (2) Law Rep. 8 Eq. 381.

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few or many the Association took only one-third of the share capital, and it mattered nothing to them whether the other corporators were eight or a thousand. To one of these companies, namely, the *Palace Company*, the Association made loans, as it was perfectly competent to do, whether with or without security. As to Mr. *Rodocanachi's* liability since his retirement in 1871, the Plaintiffs might as well have sued the liquidator of the *Park Company* as Mr. *Rodocanachi*. Was he to be liable to the end of time for every payment made, even after he had ceased to be a director? It could scarcely be meant that every sum paid away by the *Palace Company* was trust money belonging to the Plaintiff Association.

Robinson, Q.C., and *Maidlow*, for the Defendant *Turquand*:—

The case made against this Defendant is two-fold, first, the common ground of his having been a director; and, secondly, that he was the owner of part of the third share in the contract which was taken by Mr. *Rodocanachi*. If the contract was *intra vires* neither question can arise; but assuming it to have been *ultrà vires*, what harm was done to the Plaintiff Association by any of its directors taking a share of this purchase? There is no question of trusteeship, or quasi-trusteeship; and the Association had the benefit of the assistance of these persons, not only as directors, but stimulated by the fact of their having a personal interest. The fact that they were joint purchasers cannot give the Plaintiffs any right as against Mr. *Rodocanachi* and his friends, still less can they be held liable for moneys paid away after they ceased to be directors.

On the main question the following additional authority shews that where purchase-money is paid in instalments, every payment is part performance, and in equity transfers to the purchaser part of the estate: *Rose* v. *Watson* (1).

Robson, for the Defendant *Koch*.

Millar, Q.C., *Warmington*, Q.C., and *P. F. S. Stokes*, for the Defendant *Dyson*:—

That a principal cannot sue an agent for going beyond the

(1) 10 H. L. C. 672.

bounds of an authority which he has not been careful to define is laid down in *Story* on Agency (1).

Edward Clarke, Q.C., *H. A. Giffard*, Q.C., and *W. B. Heath*, for the Defendant *Margetson*.

Maidlow, for the Defendants the executors of *Fraser*:—

We do not claim to be relieved from responsibility on the ground that the action against our testator, being a personal action, would die with him. We rely on change of position, and the impossibility of a *restitutio in integrum*. In addition to the authorities already cited on this and the general question, may be adduced, *In re Saxon Life Assurance Society* (2); *Bright* v. *Legerton* (3); *Seton* on Decrees (4); *Pickering* v. *Lord Stamford* (5); *Champion* v. *Rigby* (6); *In re Mammoth Copperopolis of Utah* (7); *In re London, Chatham, and Dover Railway Company* (8); *Ashhurst* v. *Fowler* (9); *Great Luxemburg Railway Company* v. *Magnay* (10); *London, Hamburgh, and Continental Exchange Bank* v. *Henry* (11).

As to the power of a company to release its directors, or ratification, in the qualified sense, as between a company and its directors, there are the additional authorities of *Lindley* on Partnership (12); *Irvine* v. *Union Bank of Australia* (13); and on the question of the principles on which the Court deals with trustees, who, however mistaken, have been honest and free from reproach, *Speight* v. *Gaunt* (14); *In re Godfrey* (15); *Turquand* v. *Marshall* (16). The Court will not permit shareholders to turn round upon their honest directors, and endeavour to recoup from them losses arising from unsuccessful speculation: *Norway* v. *Rowe* (17). On the general question of construction may be also cited

(1) 9th Ed. p. 93, sec. 74.
(2) 2 J. & H. 408; 1 D. J. & S. 29.
(3) 2 D. F. & J. 606.
(4) 4th Ed. p. 1295.
(5) 2 Ves. Jun. 581.
(6) 9 L. J. (Ch.) 211.
(7) 43 L. T. (N.S.) 754.
(8) Per Lord Cairns, as Arbitrator in *London, Chatham, and Dover Railway Company Arbitration*, unreported.
(9) Law Rep. 20 Eq. 225.
(10) 25 Beav. 586.
(11) Law Rep. 7 Eq. 334.
(12) 3rd Ed. p. 274.
(13) 2 App. Cas. 366.
(14) 22 Ch. D. 727; 9 App. Cas. 1.
(15) 23 Ch. D. 483.
(16) Law Rep. 4 Ch. 376.
(17) 19 Ves. 144.

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Harrison v. *Mexican Railway Company* (1); *Ex parte International Contract Company* (2), and as to the improper use of the word "trustee," *Knox* v. *Gye* (3). The rule that an agent is not liable to his principal for injuries caused by mistake in a matter of law is well illustrated by *Merchants' Bank* v. *Mechanics' Bank* (4).

Crossley, Q.C., in summing up for the Defendants *Kelk & Lucas*, further cited *Taylor* v. *Chichester and Midhurst Railway Company* (5); *Eastern Counties Railway Company* v. *Hawkes* (6); *Hare* v. *London and North Western Railway Company* (7); *Parker* v. *McKenna* (8).

Marten, Q.C., for the Defendant *Borradaile*, further cited *Taunton* v. *Royal Insurance Company* (9); *Featherstonhaugh* v. *Lee Moor Porcelain Clay Company* (10); *Peruvian Railways Company* v. *Thames and Mersey Marine Insurance Company* (11); *Ex parte International Contract Company* (12); *Goodson's Claim* (13); *In re Wedgwood Coal and Iron Company* (14).

Romer, Q.C., summed up for Mr. *Rodocanachi*.

Davey, in reply:—

That the agreement of the 3rd of August, 1865, constituted a partnership in these transactions further appears from *Darby* v. *Darby* (15). The judgments of the several noble Lords in *Ashbury Railway Carriage and Iron Company* v. *Riche* (16), were very fully discussed in *Davis* v. *The Old Colony Railroad* (17). Trustees are bound to make "a full and fair disclosure": *Dunne* v. *English* (18); *Williamson* v. *Barbour* (19). The defences at the bar have been put as high as equitable release, although the

(1) Law Rep. 19 Eq. 358.
(2) L.JJ. Jan. 30, 1869.
(3) Law Rep. 5 H. L. 656.
(4) 6 Metcalfe's Rep. of Sup. Court of Massachussetts, 13.
(5) Law Rep. 2 Ex. 356.
(6) 5 H. L. C. 331.
(7) 2 J. & H. 80.
(8) Law Rep. 10 Ch. 96.
(9) 2 H. & M. 135.
(10) Law Rep. 1 Eq. 318.
(11) Ibid. 2 Ch. 617.
(12) 17 W. R. 199, 454.
(13) 28 W. R. 760.
(14) 7 Ch. D. 75.
(15) 3 Drew. 495.
(16) Law Rep. 7 H. L. 653.
(17) 41 Rep. of Court of Massachussetts, 221.
(18) Law Rep. 18 Eq. 524.
(19) 9 Ch. D. 529.

pleadings in terms only allege ratification, confirmation, and acquiescence. Cases of acquiescence resolve themselves into three classes:—first, cases of voidable agreements, that is, agreements *intrà vires*, but assailable on some ground of fraud, misrepresentation, or the like; secondly, cases of transactions beyond the powers of the directors, but within those of the company; and thirdly, where, since full disclosure and discovery, there has been such delay as to lead the Court to hold, by analogy to the *Statute of Limitations*, that the action has been barred. As to adoption, it has been admitted that not the whole body of shareholders can ratify an *ultrà vires* contract, and if so, no adoption by shareholders can amount to an abandonment of their right to sue in respect of such a contract. Where the contract is *intrà vires*, then, no doubt, there may be such an adoption as to amount to an abandonment of right to sue. Release is a totally different thing. It is not contended that the association might not have released their right of action. But release can take place only by one of two ways, either by deed under seal, which imports valuable consideration and creates an estoppel, or by an agreement for valuable consideration, in which case, if the valuable consideration be executed, there is accord and satisfaction, if it be executory only, there is equitable release, that is to say, release which may be pleaded in equity. No such deed or agreement has been proved in this case: *Pickard* v. *Sears* (1); *Freeman* v. *Cooke* (2); *Cross* v. *Sprigg* (3). The recent case of *In re London and Staffordshire Fire Insurance Company* (4) shews that provisions contained in articles of association affect only the management of the company's business. Further authorities in support of the doctrine that if you deal with an agent without informing yourself as to the nature and extent of his authority, you do so at your own risk, are *Balfour* v. *Ernest* (5); *Russell* v. *Wakefield Waterworks Company* (6).

Sir *H. Giffard* replied on *Darby* v. *Darby* (7) and *Cross* v. *Sprigg*.

(1) 6 Ad. & E. 469.
(2) 2 Ex. 654.
(3) 6 Hare, 552.
(4) 24 Ch. D. 149.
(5) 5 C. B. (N.S.) 601, 624.
(6) Law Rep. 20 Eq. 474.
(7) 3 Drew. 495.

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March 8, 1884. BACON, V.C.:—

It has not been my lot to have to deal with so remarkable a case as that which forms the subject of the present action, nor, as far as I know and believe, has any similar case at any time occurred. It is very remarkable in its nature and in all its characteristics. It is of great importance to the public, in so far as it concerns a joint stock company—to the parties, the defendants at least, of the most momentous importance, for sums said to amount to £400,000 are claimed against them. It comprises transactions of great detail extending over many years. It imputes misconduct to those directors of the Plaintiff Association who are still alive, and as to such of them as have died it seeks to make their estates liable through their representatives, but it alleges no fact in which the personal character or moral conduct of any one of them can be said to be impeached, unless some very strained inferences can be said to amount to an impeachment. There is no fact of importance in dispute. The principal, if not the only material question, is one of law, which it might have been thought was capable of direct discussion, and might have been decided without any great expenditure of time; and yet it has engaged the labour, skill, and learning of some of the most distinguished advocates of the present day, and has occupied in the argument more than a lunar month; how much more time I have been compelled to bestow upon it, it is bootless to say. No question outside the corporation is raised. The Attorney-General files no information in respect of any public rights. No official liquidator complains that the rights of any creditor or shareholder require his interference. No shareholder on behalf of himself and the other shareholders in this joint stock company asks for redress or relief, but the company itself in its corporate capacity alleges that it has been wronged by the Defendants, all of whom are members of the corporation with an exception hereafter to be particularly mentioned. The claim of the Plaintiff Association is very distinctly expressed. It asks, first and most prominently, for a declaration that the several agreements which are specified were not authorized by the memorandum of association—that they were *ultrà vires* of the corporation, and, therefore, unlawful and invalid; and that all things done under or in consequence of them by the

Defendants were breaches of trust; and upon such declaration is founded the claim for relief.

Before proceeding to consider the numerous particulars involved in this case, it is expedient that a distinct idea should be formed of the subject out of which the protracted discussions which have taken place have arisen. It is for this reason that I preface the observations I have to make by a general statement of the nature, qualification, elements, and attributes of that subject. More than twenty years ago a number of persons had agreed to subscribe their moneys, amounting to millions, for the purpose of employing the aggregate mass as capital in commercial enterprises, the notorious fact that capital is the life-blood, the animating spirit, of such enterprises being the foundation of the association. In execution of this design, in May, 1863, the *London Financial Association, Limited,* a joint stock company, the Plaintiffs in the present action, was duly incorporated, and the usual memorandum of the objects of the association was registered in compliance with the statute, together with articles of association framed for the purpose of determining and regulating the manner in which the objects of the Association should be fulfilled and its general business should be conducted; and for those purposes directors, who were to form the executive of the association, were to be appointed. All this was done in the ordinary form and in full compliance with all statutory requisitions applicable to such an institution. Business of various kinds and to a considerable extent was profitably carried on by the association up to the year 1865, when the events now to be considered commenced, and the same business has ever since been and is still carried on. It becomes, therefore, necessary to consider with great care and minuteness the terms of that memorandum of association, but in doing so the articles of association are not to be excluded or disregarded; not that they can in any respect enlarge the limits of the memorandum, but being, as they are, the "regulations" for carrying into execution the business and objects of the memorandum, they may and must be referred to for the purpose of ascertaining the true nature of the contract between the parties. The principles of the rules by which the true construction of written instruments are to be arrived at are neither difficult nor

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doubtful. Plain words must have their plain meanings, and none other can be justly or safely assigned to them. If any doubt arises as to the true intent and meaning of the words employed, it is essentially requisite that the subject to which the words relate should be distinctly understood; and to this end it may at all times be convenient, and in some cases necessary, to have regard to the circumstances attending and relating to the subject, to the interests comprised in it, to the parties to it, and most especially to its avowed, expressed, and, of necessity implied, objects. Upon those principles and rules I am called upon to construe this memorandum, and also the articles of association, and in doing so I must bear in mind the well-established rule of law that no extension of the terms of the memorandum of association can be permitted—that beyond those terms, duly construed, no lawful authority exists, and nothing can be done under or in relation to the subject comprehended in the instruments. I wholly repudiate the notion that I am at liberty to adopt what has sometimes been called a "liberal" construction. I have no more right to do that on the one hand than I am at liberty on the other to adopt a more rigorous or more strict construction than the express stipulations of the instruments require. What the law requires and what I am called upon to do is to put a just construction, and no other, upon these instruments.

The memorandum of association, not inaptly called the charter of the incorporation, states that the "objects" for which the company is established are—"the carrying on for profit or gain the trades or businesses of discounters, lenders of, and dealers in, and exchangers of, money—the receiving of deposits of money, the advancing and lending of money on real, personal, or mixed securities," and then follow ten lines in which mention is made of a great variety of subjects "on" which money may be advanced or lent. The preposition "on" is then dropped, and the ensuing words are "the discounting bills of exchange, promissory notes, bonds, and other securities and obligations." The difference between "advancing," "lending money," and "discounting," is distinct and palpable. "Discounting" is purchasing, not lending. The discounter, whether of a bill, or bond, or any other security, becomes the owner. If the thing bought turns out

when realised to be of less value than the price paid for it, the loss falls upon the purchaser or discounter. If a profit or gain is made upon the transaction, it belongs wholly and exclusively to the discounter or purchaser. Then the words "advancing of money" are taken up, and there ensues a long list of subjects "on which" money may be advanced, including "the deposit of title deeds and bills of sale," and ending with, "on any other property of whatever kind and description." The drawing and indorsing bills of exchange at home and abroad, and the borrowing of money on the notes or bills of the company is provided for. The next object of the Association is the contracting for and the contributing to loans to any Government, British, Colonial, or foreign, and then "the making of purchases" (not lending or advancing) "investments, sales, or any other dealings of, or in, any of the above-named articles or securities." The words "the doing of all such acts and things as may be necessary or convenient," seem to be limited to cases as to money advanced. Then follows "the carrying on of any business, work or operation, and carrying out of any contracts, execution of any works, or performance of any agreements on, or in respect of, or in reference to, which any moneys of the company may have been advanced or agreed to be advanced"; and it ends with "the entering into and carrying on of any monetary or financial arrangements or operations, and the doing of all matters and things which may appear to the company to be incident or conducive to the objects aforesaid or any of them."

Upon this record and in the present case the memorandum of association and the articles which accompanied it, and which are by the agreement of the parties substituted for Table A of the statute, are to be read together, not for the purpose of extending the terms of the memorandum of association or adding to the objects of the association; but they may and must be considered as expressing the meaning of the words used in the memorandum, for the two instruments taken and read together constitute the contract of partnership between the shareholders who are the parties here litigant. It was unquestionably the right of the partners to agree upon what terms and under what regulations they would carry on their partnership; for partnership it was,

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constituted and regulated by the memorandum and the articles together, just as much as if all the stipulations contained in them had been engrossed in a deed of partnership indented and executed, but containing an agreement of the parties *inter se* that their business should not extend beyond the limits in that instrument expressed. [His Lordship then referred to the articles of association, especially articles 2, 19, 20, 21, and 26, and continued.] The articles comprehend the objects of the company, the employment of the capital, and the rules by which the business of the company is to be conducted, and which the parties have determined *inter se* shall be binding upon them.

The case of the Plaintiffs is founded upon a very strict and literal examination of the words of the memorandum, and it has been argued on their behalf that inasmuch as the objects for which the company is established are at the beginning of the memorandum stated to be "to carry on the business of discounters, lenders of and dealers in and exchangers of money," these are the only trades or businesses which the association is authorized to carry on, and that all the words which ensue are merely ancillary, and are at the most a development or expansion of the trade or business of lenders of money.

I am unable to adopt that argument. It is not enough to say in answer to it that if it were to prevail all the succeeding words would be useless. I am not at liberty to say that the parties to this contract meant nothing by the words they have thought fit to employ for defining and regulating the conduct of their lawful business. On the contrary, I think, in all justice and fairness of construction, the several items or articles which ensue in the memorandum are inserted for the purpose of enumerating the several subjects on which the moneys of the Association may be employed. The words "advancing" and "lending" may each have a different signification; money may be "advanced" without being "lent;" the relation of borrower and lender does not exist in a great variety of the transactions which are distinctly authorized. The possession by the association of the various "articles" or "symbols" may give them the means of getting back some or all of the money they may have "advanced" without giving them any title to sue for its repayment, as, among

many other instances, the authority to subscribe for or contribute to loans of any Government, British or foreign, and that notwithstanding they are called "loans." So far from the words I am considering being read (as has been argued) as if the word "viz." were prefixed to them in their entirety, I read them as meaning and plainly expressing an authority to effect and accomplish any and every of the subjects enumerated or specified; and in thus construing the memorandum of association I am confirmed by the concluding words, "the doing of all matters and things which may appear to the company to be incident or conducive to the objects aforesaid or any of them."

A most able, acute, and elaborate argument on the part of the Plaintiffs was addressed to this topic. The point of it was, that these concluding and general words of the memorandum did not extend its effect and signification beyond the limited sense which the Plaintiffs assigned to them, and reliance was placed upon the judgment of the House of Lords in the case of *Ashbury Railway Carriage and Iron Company* v. *Riche* (1). The authority of that case, in which several of the most learned of English Judges concurred, is, I need not say, beyond the possibility of doubt. The question was whether a covenant entered into by an incorporated company was within or beyond the powers conferred by the memorandum of association. The *Ashbury Railway Carriage Company* was formed for the purposes mentioned in the memorandum of association. What they had done was, that they purchased a concession made by the Belgian government for forming a line of railway in that country, and they gave the contract for its construction to Mr. *Riche*, thus becoming, in fact, themselves, the constructors of the line. Disputes arose, and *Riche* sued the *Ashbury Company* for moneys alleged to be due to *Riche* under the contract made by the company with them. The memorandum of association in the *Ashbury Case* contained, besides the particular objects specified, an authority to carry on the business of "general contractors"; and upon those words it was argued on behalf of the plaintiff that the contract there sued upon was within the authority of the memorandum. To this argument Lord *Cairns* said (2), and the other noble Lords

(1) Law Rep. 7 H. L. 653.

(2) Law Rep. 7 H. L. 664, 665.

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concurred with him: "Upon all ordinary principles of construction, those words must be referred to the part of the sentence which immediately precedes them . . . If not, the consequence would be that the phrase 'general contractors' would stand absolutely without any limit of any kind . . . In place of specifying a particular kind of business, it would virtually point to the carrying on of business of any kind whatever, and would therefore be altogether unmeaning." If the general words in the present case were the same or similar to those in the *Ashbury Case* (1) the judgment I have quoted would apply. But as I read these general words, they are not only wholly different in themselves, but their collocation and communication with and reference to the words by which they are preceded make it distinctly evident that their insertion and employment were intended to exclude all doubt as to the power of the company to do whatever "might appear to the company to be incident or conducive to the objects aforesaid." Not that they did, or could, or were meant to authorize the company to do any other things than those which had been previously declared to be the "objects" for which the company was established, but to prevent the failure in accomplishing those objects (and no other objects) by reason of any merely verbal or accidental error or uncertainty in the expressions applicable to those objects. The memorandum consists of one continuous sentence without stop or break; the objects for which the association is established are numerous and of great variety, all of them having for their end and aim, profit or gain, all of them to be effected by means of "monetary or financial arrangements and operations." No one of the objects mentioned can upon any sound principle of construction be omitted or disregarded, and all such matters and things within the terms of the memorandum as may appear to the company to be incident or conducive to those objects, or any of them, may be done by the company. And the articles carry this no further, as appears by their frequent reference to the memorandum, which is incorporated with them, although, as I have said, the articles may be properly considered for the purpose of explaining the terms and expressions of the memorandum wherever it may be just and reasonable so to refer.

(1) Law Rep. 7 H. L. 653.

It is now necessary to consider what has been done by the directors and by the other persons concerned in the transactions forming the subject of this action. Those transactions have been numerous, and in tracing them an almost infinite number of details have been gone into. But although their history commences so early, at least, as the year 1865, and extends to the time at which this action was brought, in the year 1879, it cannot be said that any substantial matters of fact are in dispute. The minute-books and the account and other books of the Association, all the letters and other documents referred to, the depositions of the agents and persons employed by the Plaintiff Association, reports of meetings of shareholders, reports of committees, have all been brought forward, all are in the possession or under the control of the Association, and have been used by them, and although it may be truly said that their use and display have been more than ordinarily prolonged, and even tedious, it cannot be said that the Plaintiffs have laboured under any difficulty in presenting to the Court the case on which they rely.

In the month of June, 1863, a joint stock company had been formed, called the *Alexandra Park Company*, for the purpose of acquiring an estate at *Muswell Hill*, consisting of between 400 and 500 acres, and erecting thereon the building which was subsequently known as the *Alexandra Palace*. The Defendants, *Kelk & Lucas*, had erected the Exhibition building of 1862, and were bound to remove the same when it should be closed, and they accordingly removed such parts of the Exhibition building as remained upon their hands to the *Muswell Hill* estate, with the view of employing them there in the construction of the *Alexandra Palace*, and with this view they contracted to build it for the *Park Company*. Of this company the pecuniary resources proved inadequate to the completion of their original design. It proved to be a failure, and was ordered to be wound up in March, 1865. Before the total failure of the *Park Company*, applications had been made to the Plaintiff Association in its character of capitalist and money-lender, to advance moneys required by the *Park Company*, but as all these attempts fell through, I need not advert to them further than to remark that

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in the course of them the directors became acquainted with all the particulars relating to the condition of the *Park Company*, its means, assets, and prospects. The directors also became aware of the fact that Messrs. *Kelk & Lucas*, whom the Plaintiffs have sued as Defendants in this action, were greatly interested in the affairs of the *Park Company*, as well in respect of the debt due to them as contractors for the unfinished building, as upon debentures of the *Park Company*. The debts of that company were something more than £300,000, exclusive of a sum of about £105,000 secured by a mortgage, and their assets consisted of the land, the incomplete building which was to be the *Palace*, and some materials intended to be used in the construction. The assets were in due course to be realised by the official liquidator in the winding-up, and they were offered by him for sale.

At this time it may be fairly conceived, without any notion of entering into a wild speculation, that in the judgment of persons of knowledge and experience in monetary transactions, the property of the *Park Company*, straitened as that company was for the want of money, presented a prospect of securing that same "profit and gain" which it was the aim and object of the Association to acquire by the employment of some of its capital. The directors were not the only persons who entertained this belief, for when it was proposed to them that they should so employ a portion of the capital of the Association, Mr. *Rodocanachi*, a Defendant, who was a merchant of repute, and Messrs. *Kelk & Lucas*, persons of means and experience, were willing and offered, each of them, to pay one-third of the purchase-money, on condition that the Association should furnish the other third—not that either of the parties should become landowners, but that by means of their equal subscriptions in money, the property of the *Park Company* might be acquired, in order that other and different capital should be furnished by means of the formation of two other joint stock companies, by which, when the original project of the *Park Company* should be accomplished, the anticipated profit and gain would be realised—securing to the Association in the first place a commission of £2 per cent. on the purchase-money. It would be out of all reason to suppose that by means of the then present advance of £310,000 any profitable use could be made

of the purchase. Neither of the parties contemplated becoming the owners of one acre of land, either to become a place of public entertainment, or to be let out in lots, or to become landlords of such of the acres as would not be required for the *Palace* and its appurtenances. Their true object is distinctly stated in the agreement of the 3rd of August, 1865, which was entered into by the directors on behalf of the company, and by *Rodocanachi* and Messrs. *Kelk & Lucas*, and which was in these terms :—[His Lordship then read the agreement of the 3rd of August, 1865, and continued :—]

Now upon this part of the case, which involves by far the most important of all the questions which have been argued, I am of opinion there has been no violation by the directors of the powers of the company, expressed as they are in the partnership contract; regard being had to the memorandum of association and the articles. There remain, however, several other matters which require attention at this part of the case. The purchase from the official liquidator having been completed by the payment by each of the contracting parties of their respective one-thirds, steps were forthwith taken for the formation of the two projected companies mentioned in the agreement, and the two companies were duly formed, some progress was made as to each of them in anticipation of their actual incorporation, and various payments were made by the Plaintiff Association, Mr. *Rodocanachi* and Messrs. *Kelk & Lucas*, in their characters of shareholders and debenture holders in the two new companies. This fact has been mentioned in the discussion, but hardly insisted on by the Plaintiffs, and is in my opinion of no importance, since it cannot affect the questions which have been seriously argued. Owing to a very remarkable and serious depression in the money market at about the time when the two new companies were formed, the shares and debentures were not saleable at prices near their nominal amount, and they consequently remained on the hands of the persons who had taken and paid for them. In consequence, it became necessary that large advances should be, and they were, made by the Association, as well as by the Defendants *Rodocanachi* and *Kelk & Lucas*, in equal proportions up to the year 1871. In 1868 Mr. *Rodocanachi* resigned his

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office of director. In 1871 he appears to have resolved to make no further advances, and he sold his interest in the concern to Messrs. *Kelk & Lucas.* The directors, whose advances at this time were of large amount, thereupon agreed with Messrs. *Kelk & Lucas* to buy from them one-half of the interest which had been relinquished by Mr. *Rodocanachi.* This transaction was carried into effect by the deeds of 1871, which have been frequently referred to in the course of this discussion. Thenceforth the whole of the property which had been acquired, as I have stated, became vested in the Plaintiff Association and Messrs. *Kelk & Lucas.* Further advances were made by them in equal shares for the purpose of completing the *Palace.* The amount of all the advances made by the directors on behalf of the Association, as well upon as subsequent to the agreement of August, 1865, are all stated in a table appended to the claim, and the particulars of all such advances are stated with most minute particularity in voluminous schedules also annexed. For what reason this has been done I am not able to imagine, since, if the claim could be sustained, the account and inquiries which in that case would ensue could not be dealt with in Court, and in the alternative they would be wholly useless. Burthensome as they have been to all persons concerned, they have had the effect of consuming many weary hours which might have been more profitably employed. They consist entirely of compilations from and transcripts of the books and documents the property of or in the possession of the Plaintiffs, and there is no doubt or dispute as to any item.

The rest of the history of the unfortunate *Palace* "built in the eclipse," may be shortly told. By means of the advances I have mentioned the *Palace* was completed, and opened for public use; and very shortly afterwards, on the 2nd of June, 1873, was destroyed by fire. The amount for which it had been insured was much below its real value. The directors of the *Palace Company* endeavoured to raise money sufficient for its restoration by the issue of preference shares, but all their efforts were unsuccessful, and in August, 1876, it was wound up by an order of the Court, and the Plaintiffs have since purchased, and are now the owners of the whole estate and assets of the *Palace Company.*

One of the charges pressed by the Plaintiffs was that the directors, by entering into the agreement of August, 1865, had committed the Association to a partnership with Mr. *Rodocanachi* and Messrs. *Kelk & Lucas*, and that they had, in this respect, violated and exceeded the terms of the memorandum, and had exposed the assets of the Association to the risks attendant upon a partnership. It does not appear to me that either in law or in fact any kind of partnership was created. Each of the three parties was entitled under the contract to an undivided share in the subject. Each paid for that share with individual separate money. The three had, no doubt, in a sense, a common interest in the subject, but no one of the essential elements of a partnership was found to exist in the case, for no one of them could interfere with either of the others in whatever disposition the others might make of their separate shares, nor could the death or bankruptcy or transfer or devolution of the shares of any one of the parties affect the rights of the others; neither of them could object to the introduction of any other person, or be liable in respect of any debt or engagement of the others. Nor can it be truly said that any analogy exists between this case and the well-known cases in bankruptcy where, one partner, a trustee, having employed trust moneys with the knowledge and consent of his co-partners in the partnership business, a joint debt is contracted by all the partners. Here the only money furnished by the directors was for the purchase of the separate share acquired by them, while each of the parties dealt only with their own moneys, and each of them acquired rights and interests wholly distinct from those of the others.

Another of the charges against the directors is that, being trustees of the incorporation, they have committed breaches of trust in applying the moneys of the association in the manner stated. It cannot be disputed that directors are not improperly called trustees, because in many of the cases which have been referred to, the directors of a joint stock company have been called by that name, but for the sake of distinction only, as they are much more frequently and much more properly called *quasi*-trustees. But what sort of trustees are they? They are the managing partners of a large joint stock company dealing with

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the subscribed capital with a view to profit or gain. They are selected, I may assume, from their being qualified by their habits and acquirements as men of business to conduct the important and numerous transactions of the association. They are paid for their labours, and they are expected and bound to watch over and protect the interest of themselves and their co-shareholders, but it is not suggested that they have failed in the discharge of these duties except only so far as the accusations against them depend upon the construction of the memorandum of association.

Among the multitudinous cases which have been cited in support of the Plaintiffs' contention—and there has been no lack of that "index lore which turns no student pale" on all sides in the course of the discussion—there is not one, so far as I know, in which directors of a joint stock company have been held to be answerable for losses sustained by their mere innocent mistake, nor unless that mistake has been accompanied by some fraudulent, or at least suspicious conduct or motive.

One of the cases cited on behalf of the Plaintiffs was the case of *Joint Stock Discount Company* v. *Brown*, but that was in its more simple form a mere case of fraud. So the Vice-Chancellor, Sir *William P. Wood* treated it upon the demurrer argued before him (1). So the Vice-Chancellor *James* treated it when the case came to be argued before him (2). He not only adopted implicitly the judgment of Vice-Chancellor *Wood* that the transaction in which the directors (there the defendants) were implicated was *ultrà vires*, but he expressed himself in terms which make it evident that he thought the whole scheme might not improperly fall within the jurisdiction of a criminal Court. Describing the general case, he says (3): "When the bill was filed, a demurrer was put in by one of the defendants, upon the hearing of which it was held that all these transactions were *ultrà vires*, that they were, in truth, a scheme for bringing out a joint stock company, with sham applications for shares, and with other arrangements which were, to a certain extent, a sham; and that the proceeding was not, in truth, either 'an investment in

(1) Law Rep. 3 Eq. 139. (2) Law Rep. 8 Eq. 381.
(3) Law Rep. 8 Eq. 399.

securities,' or a 'thing' which any director could have fairly, honestly, or reasonably considered to be 'incidental or conducive' to any of the objects which were mentioned in the prospectus. In that decision I have already expressed my entire and unhesitating concurrence. I think it would be quite shocking if it were otherwise." With this exordium he proceeds to deal with the cases of the individual directors against whom the claim was directed. He lets off Mr. *Gillespie* because he holds there was no sufficient evidence of his connivance or concurrence. But when he comes to the case of Mr. *Brown*, who knew all about what it was intended to do, and what was done, he finds and decides that as Mr. *Brown* knew that the course proposed was wrong, and as all that he did to prevent it was to protest by two letters, he fixes him with liability.

Upon the same subject reference was made to *Flitcroft's Case* (1), in which directors were held to be liable for their misapplication of the capital of the company. But that also was a case in its nature fraudulent. The trustees had possession of the capital and were bound to preserve and duly apply it. They had also possession and control of the revenue of the company—the money in the till—the only money applicable for dividends. They declared dividends upon a representation that the revenue or profits of the company were sufficient for the purpose, and they paid such dividends to themselves and the other shareholders not out of the money in the till (which was empty), but out of the capital which it was their duty to preserve.

I am wholly at a loss to conceive that there is any resemblance in the facts, or any analogy in the circumstances, between those two cases and those of any of the directors, dead or alive, in the case before me; for it is not alleged that anything they did or that is now complained of was by them known or believed to be beyond their powers or otherwise illegal. Every part of the conduct of the directors, dead or alive, all that was said or done by them, leads to a directly contrary conclusion. They acted under such advice as they had, which, of course, would be no protection if they had acted with culpable negligence; they acted according to their own experience and knowledge in the business affairs

(1) 21 Ch. D. 519.

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with which they were conversant; they dealt with the interests confided to them in the same manner as with their own, indeed their own interests and those of the association were identical and inseparable. If the Association gained, they shared the gain; if a loss was incurred, they bore their share of the loss. If that most ordinary and most just rule which has been long established in Courts of Equity, viz., that the integrity of trustees shall be assayed by the test whether or not they did in the discharge of their duty that which an honest and prudent man would do with his own, is applied to these directors, they must be absolved from all blame. And even if it should be held that they had misinterpreted the terms of their authority, the error was at the most a venial one—one in which their present accusers participated, and one in which no instance can be adduced in which a Court of Equity has visited upon trustees the punishment which is reserved for wilful misfeasors or for trustees whose negligent discharge of their duties merits punishment. The Defendants, one and all, dispute and deny that the agreements they have entered into and the acts they have done, or in which they have been in any manner implicated, were *ultrà vires*, or in any manner exceeded the objects contemplated by the memorandum of association, or the powers conferred upon them and the duties prescribed by the articles; and they insist that even if the things complained of shall be held to have been *ultrà vires*, and their construction of the memorandum and articles erroneous, their mistake has been a venial one, and not such as upon the principles of a Court of Equity can be held to be such a breach of trust as imposes upon them the liability to make good all losses occasioned by their honest mistake. It is not suggested that the directors had any other object than to promote the interests of the Association. No imputation of bad faith is made against them, no allegation or even insinuation that they had any interests of their own to serve, or that their action had anything in view other than to promote the interests of the shareholders, the body of which they were themselves members, by laying out their own moneys and the moneys of the other shareholders in an enterprise which it was believed would in the result add largely to the profit and gain contemplated by the Associa-

tion. And upon this head of the claim it appears to me that they are not liable in respect of the breaches of trust alleged to have been committed by them. But, in addition to the several charges brought against the directors already mentioned, they are accused of having concealed from the shareholders the true nature of the transactions complained of, and of having, in order to avoid the discovery by the shareholders of the manner in which the capital of the company had been employed, withheld from the shareholders all information respecting the transactions with the *Alexandra Palace Companies*, and evaded the inquiries made of them at the general meetings. Such a charge is of the utmost gravity, and one by which, if it could have been substantiated, the whole of the conduct of the directors—whether they are considered as *quasi*-trustees or as managing partners—would be exposed to the most serious imputations. But when the facts relating to this topic come to be examined, as they have been by a most elaborate scrutiny, the charge appears to me to be wholly unsupported.

By the constitution of the Association it was necessary that half-yearly meetings of the shareholders should be held, at which it was the duty of the directors to make written or printed reports as to the condition of the company, and to exhibit accounts in the shape of balance-sheets shewing the debts and assets of the company. These meetings were all duly held, and then accounts were produced and furnished to the several shareholders. And it is not suggested that the accounts so published were in any particular incorrect or imperfect. But it is said they were not sufficiently explicit, and did not convey to the shareholders the full information they were entitled to receive from the directors; and upon this alleged insufficiency is founded the charge of concealment. At the meetings of the shareholders some of the persons present expressed in terms more or less angry the disappointment they felt at not receiving the dividends they expected from their respective investments. It is not necessary that I should pursue in detail the proceedings at these meetings, or recapitulate the discontented or acrimonious complaints of some of the shareholders. All that they said, and all that the directors said in answer to their complaints, was recorded in the shorthand writers'

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notes of what then took place. Many, if not all of them, were chronicled in newspapers, and copies of the narratives were sent to all the shareholders, and most of them have been referred to in the discussions here. To recur to them more particularly would be merely to waste time. It is enough to say that they expressed the discontent of some of the persons present, and that the directors, on replying to complaints, and refusing to answer some of the inquiries made of them, declined to state in particular the nature of the securities on which the moneys of the Association had been invested. Their reason for this reticence they allege to have been, that to make such disclosure as was demanded of them would have been injurious to the interests of the Association, and would have prejudiced the value of the securities they held; and that this was the opinion of persons well qualified to form opinions on the subject is distinctly proved in evidence, is confirmed by the report of the commissioners who had inquired and reported upon the subject on behalf and in the interests of the shareholders, and may even be said to be self-evident, having regard to the notorious fact that there are always at hand persons active and vigilant to note and take advantage of any event by which the market in shares may be affected, and to make profit of the temporary or other difficulty by which the saleable value of such shares may be depressed. But does this reticence of the directors justify the charge that it is to be referred to a fraudulent intention or evasion on their part? What was done by the directors was this. In the month of June, 1876, in compliance with the request of certain shareholders, that the then present position of the affairs of the Association should be investigated and considered, a committee of five shareholders all of whom were largely interested in the Association, was appointed, and on the 14th of July, 1876, that committee issued to the shareholders a report of that date, in which they stated that they had met on eight different days, during which time every facility necessary to a careful investigation of the business and interests of the Association, past and present, had been promptly extended to them by the board of directors, the managers, and the various officials; and, without giving details, which they stated would make their report too voluminous, they said they felt fully justified in

asserting that the assets and securities as held in the then previous January were intact, that in no instance had securities been sacrificed, and that, considering the magnitude of the business, no losses of importance had been incurred. The committee stated, further, that in estimating the securities and the assets of the Association, they had sought and received good and competent advice independently of the directors. This report was forwarded to every shareholder in the Association, together with the directors' report issued prior to the meeting held on the 25th of July, 1876, and the directors in their report then made alluded to the report of the shareholders' committee, which was discussed and commented on in the discussion which then ensued. At the general meeting held on the 22nd of July, 1877, a suggestion was made on behalf of the shareholders that a committee of investigation should be appointed to inquire into the position of the Association, and a committee was then agreed to, but, in consequence of some of the members having declined to act, it fell through. The directors issued a report, dated the 20th of September, 1877, and summoned a general meeting to be held on the 7th of October, 1877, to again discuss the matter, and, if the shareholders so desired, to appoint a fresh committee. In their report the directors referred to the meeting on the 22nd of July, explained how it was that the committee of investigation then appointed failed to act, and offered to afford every facility for another committee. The directors also expressed their desire that the shareholders should possess the fullest information respecting the position of the Association; but they suggested that the publication of a detailed list of securities would not be really beneficial to the shareholders, but might prejudicially affect the position of the Association and the value of its shares and property. On the 7th of October, 1877, an extraordinary general meeting of the shareholders was held, according to the notice, to discuss the position of the Association, and it was then resolved, "That the directors' report and accounts be received and entered on the minutes, and that a committee of shareholders be appointed, with full powers to examine into the past transactions and present position of the Association and report to the shareholders." Such a committee was then appointed, and afterwards

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held eighteen meetings, at which a full investigation into the affairs of the Association was made, and the committee drew up and submitted to the shareholders of the Association a report, dated the 4th of December, 1877, in which they stated that every assistance had been given on the part of the officers of the Association, and every information which the committee desired was fully laid before them. A list was then given of the principal points which engaged the attention of the committee, whereby, among other things, it appeared that the company's interest in the *Muswell Hill* estate was known and had been fully investigated. The report acknowledged the honesty and good faith with which the board had acted, the material aid which the directors had personally rendered in times of need, and that the directors themselves held a large interest in the Association; and stated in express terms that they, the committee, did not recommend the publishing a detailed list of the securities, and stated that in coming to this conclusion they were only considering the interests of the shareholders. It was further recommended by the report that it should be left to the board to decide upon any further expense which should be necessary for completing the works or developing the undertakings in which the Association was interested. This last report was sent to every shareholder direct by the committee, and was referred to in the directors' report issued prior to the general meeting held on the 27th of January, 1878. This last-mentioned report of the committee was fully discussed at the general meeting of shareholders, held on the 27th of January, 1878, and the reports both of the directors and the committee were adopted in general meeting, and besides these reports, one other, prepared by the auditors of the Association, dated the 16th of January, 1877, was drawn up, explaining the nature of the connection of the Association with the *Muswell Hill Estate* and *Alexandra Palace Companies*, and a copy of the last-mentioned report was sent to every shareholder on or before the 19th of January, 1877. On that day, at an extraordinary general meeting, the report was discussed, another committee was appointed for the purposes mentioned in the notice, and the meeting was adjourned until the 9th of April, 1877; but before that day arrived the committee last mentioned and the directors had

purchased the entire estate and effects of the *Palace Company*, including eighteen acres of freehold land, which thereupon became and are still the property of the Association.

And this brings me to the consideration of one of the material points before me. I have said that, in my opinion, there has been no exercise by the directors *ultrà vires* of the authority conferred upon them, having regard to the true construction of the memorandum of association and the articles. I have found upon the evidence that there has been no concealment by the directors of anything done by them by which the shareholders were kept in ignorance of the true state of the affairs of the Association. It remains to be considered whether by their own acts and conduct the Association have not fully and entirely relinquished and disclaimed any right of relief which they might have had, even if, on the true construction of the memorandum of association, the charge of *ultrà vires* had been established. The contract between the parties being one of partnership, and there being no ground for imputing personal fraud or misconduct to the Defendants, the questions to be decided are such as can only be considered as having taken place between partners whose rights are defined by their articles of partnership. If in an ordinary partnership it had been ascertained that the managing partners had so far mistaken their powers as to engage the partnership in undertakings beyond the scope of the partnership business, it would have been competent to all or any of the partners to dispute and to exclude from the partnership accounts all items or entries relating to such excessive or extraordinary trading. In the present as in many partnership articles there is a stipulation in art. 132: "That every account of the board when audited and approved by a general meeting, shall be conclusive, except as regards any error discovered therein within two months next after such approval thereof." Such a provision is not idle or inofficious, but is of the very essence of partnership business. No managing partner or director whose duty it is to deal with the funds of a partnership and to account for their employment could with safety perform his duties without the protection and indemnity of such a provision, which, indeed, is not less for the benefit of the other partners than for the managers. Here auditors were appointed; it is not

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doubted that they duly and skilfully discharged their duties. At every half year from the commencement of this partnership such accounts have been kept and audited, submitted to the meetings, furnished to every shareholder, and there is no suggestion that any error has been or can be detected in them.

In accordance with the article I have referred to, and the universal practice at all the general meetings of the company, a resolution was proposed, on the 22nd of July, 1867, "that the reports and accounts now read be received and adopted." That resolution was not carried; but it was resolved that the directors' report and accounts be received and entered on the minutes, but not adopted; and subsequently the committee I have before mentioned was appointed on the 7th of October following. Then, with all the information given by the several reports and acquired at the several meetings which were subsequently held, and after the numerous discussions there occurring, by the vote of the general meetings, the accounts, as well those the reception of which had been suspended as those which were subsequently audited and rendered, were conclusively adopted by the Association.

Now, by whatever name this dealing with the accounts may be called—whether acquiescence, adoption, or release—it amounts, in my opinion, to a settlement of all question or cause of dispute between the Association and the Defendants sued in respect of their being directors. I take the law to be, that with respect to that dispute it was competent to the Association to do anything which an individual might do: *Bath's Case* (1). I adopt the qualification or condition expressed in the judgment of Mr. Justice *Willes*, in the *Phosphate of Lime Company* v. *Green* (2), that the ratification or adoption must be with full knowledge of the character of the act adopted; but I find as a fact that the Association and the persons voting at the meetings did possess that full knowledge. I say this, having distinctly in my mind the several reports by shorthand writers of the numerous meetings at which the shareholders were present and made parties, but which are much too long to refer to more particularly. They not only possessed full information, but they

(1) 8 Ch. D. 334. (2) Law Rep. 7 C. P. 43, 57.

evinced sufficient knowledge of what they conceived to be their rights; and in their reproaches and threats against the directors they did not omit to mention their right to take legal proceedings. Considering the great length of time which has been covered by these matters I have been surprised at not having heard any attempt to account for their forbearance, since there could have been no difficulty in any one of them bringing an action on behalf of himself and the other shareholders. Nor do I think that in connection with this point of delay, the subsequent dealings of the Plaintiff Association are without importance. It appears that under the advice and with the assistance of a committee of shareholders appointed by the Plaintiffs, the directors have purchased the whole of the property of the *Palace Company*—that they have acquired by means of that purchase a valuable addition to the property, and have dealt with it for value, or at all events as they thought fit. In short, they have done the very thing which they say was wrongfully done by the directors.

As regards the Defendant *Rodocanachi*, I think that no case is established which justifies the Plaintiffs in making him a Defendant. He ceased to be a director in 1868, and in 1871 he sold all his interest in the concern. Nor is there more reason for asking relief against *Kelk & Lucas*. There is a somewhat timid imputation against them—an insinuation that they have been actuated by blameable motives in taking the part they did in the several transactions. They were originally creditors of the *Park Company*, and they did no more than any creditor might lawfully do in seeking to get their debt paid. Under the agreement of 1865 they fulfilled all their obligations, and paid all that they had agreed to pay. It is not disputed that they performed their contracts with the *Palace Company*, if that subject had (as it had not) anything to do with the present contest. They have, each of them, been examined and cross-examined, but in the result and upon the undisputed facts of the case I think the case alleged against them fails. Among the hard things which have been said against the directors they are taunted, if not censured, for not having tendered themselves as witnesses. I do not think they are open to censure or suspicion on this head, for the Plaintiffs

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might have examined them upon interrogatories, and they have, in fact, furnished the Plaintiffs with the whole of the evidence, oral and documentary, which has been adduced, and they rely upon these facts for their defence. If the Plaintiffs could have proved more than they have tendered, or could have disputed the statements of the Defendants, or could have rebutted the inferences on which the Defendants rely, it was open to them to call the shareholders present at the meetings; but no one of them has appeared.

Upon the whole, having given to this most involved case the utmost attention it has been in my power to bestow, I am constrained to dismiss the action and to direct judgment to be entered for the Defendants. Having disposed of the case as far as my present judgment extends, and upon the evidence and arguments proffered by the parties, and upon this alone, I may be permitted to say that if the experiment of the Plaintiffs had succeeded, knowing what in this Court my experience has compelled me to know about the nature and proceedings of many joint stock companies, it would have been appalling to contemplate the flood of litigation which might have ensued.

His Lordship accordingly ordered judgment to be entered for the Defendants, with costs, and, upon the application of Mr. *Marten*, Q.C., directed that the costs should include the costs of the whole of the shorthand notes of the daily proceedings at the trial.

Solicitors: *C. & S. Harrison & Co.; Fladgate, Smith, & Fladgate; Dawes & Sons; Bompas & Co.; Cunliffe & Co.; Hollams, Son, & Coward; Redpath & Holdsworth; Argles & Co.; Andrew, Wood & Co.; Phelps, Sidgwick, & Biddle.*

J. B. D.

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Feb. 14.

[1854 S. 55.]

Suit for Administration—Taxation of Costs—Solicitors' Remuneration Act, 1881 (44 *&* 45 *Vict. c.* 44)—*General Order, August,* 1882, *r.* 2—*Costs for Conveyancing Business in an Action.*

Solicitors who transact conveyancing business in an action will, under the *Solicitors' Remuneration Act,* 1881 (44 & 45 Vict. c. 44), and the General Order of August, 1882 (1), be allowed taxed costs and charges for such business according to the scales set forth in the schedules to the General Order.

The proper construction of the language of sect. 2 of the *Solicitors' Remuneration Act,* 1881, is that it refers to conveyancing matters which take place in an action as well as to those out of Court, and that the exception is only from "other business" not being conveyancing business, and accordingly where the Taxing Master had disallowed certain charges made for conveyancing business in an action, and under the scales of charges contained in the schedules to the General Order of August, 1882, he was directed to review his taxation.

Adjourned summons.

The application was by the Plaintiff asking that it might be referred back to the Taxing Master to whom the taxation of the costs in this suit stood referred to review his taxation under the order dated the 31st of May, 1883, in respect of certain items of charge in the bill of costs of the applicant. The order of the 31st of May, 1883, directed the taxation of the costs of the Plaintiff, including charges and expenses properly incurred by her incident to or attendant upon the negotiation for and exercise of the power by the will of *William Stanford,* deceased, vested in her as tenant for life, of granting leases for the term of ninety-nine years, and in and about the exercise of the powers of the *Stanford Estate Act,* 1871. The circumstances which led to the making of the order may be gathered from the reports of *Stanford* v. *Roberts* (2) and *Stanford* v. *Roberts* (3).

In taxing the Plaintiff's bill of costs the Taxing Master had disallowed certain charges for settling conveyances, perusing

(1) W. N. (1882) pt. II. p. 358. (2) Law Rep. 6 Ch. 307.
(3) W. N. (1882) 146.

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documents, and for journeys to *Brighton*, where the property, which was the subject-matter of the suit and of such conveyances and documents, was situate. The charges were the proper amounts payable under the scales of charges contained in the schedules to the General Order made in August, 1882, in pursuance of the *Solicitors' Remuneration Act*, 1881 (44 & 45 Vict. c. 44). By sect. 2 of the Act it was enacted that the Lord Chancellor and the other persons named might from time to time make any such general order as to them seemed fit "for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court or in the Chambers of any Judge or Master, and not being otherwise contentious business." The General Order made in August, 1882, and which came into operation after the 31st of December, 1882, contained in rule 2 the language of the above section, "in respect of business connected with sales," &c., and the remuneration applicable to conveyancing business only was regulated as set forth in the schedules to the order. Objections to the taxation of the items so disallowed were left by the Plaintiff in the office of the Taxing Master, and he stated to the Court the reason for his decision thus: "I consider that the intention of the order is that the words in the 2nd section of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, 'not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master,' should apply to matters of conveyancing so transacted. I have therefore allowed in the matters of conveyancing transacted in the above suit the charges for such business heretofore allowed. It may be remarked that by having the sanction of the Judge in Chambers to all these transactions, the solicitor incurs no responsibility, and simply acts under direction. The increased charges are in these costs applied to instruments not materially (if at all) shorter than they used to be."

Hastings, Q.C., and *J. Beaumont*, for the Plaintiff:—

The General Order of August, 1882, with the scale of charges

in the schedule, applies to conveyancing business whether transacted in an action or not. Grammatically the words of exception in the 2nd section, "not being business in any action," &c., must be referred to the words "other business" which immediately precede. If the section be ambiguous the grammatical construction ought to be adopted. The statute 44 & 45 Vict. c. 44, was passed because the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), which received the royal assent on the same day (August 22, 1881), curtailed the length of conveyances, although the trouble and care required in preparing them had not been diminished. It was thought right that the scale of remuneration of solicitors, which had previously been allowed according to the length of the document, should be readjusted. There can be no reason why solicitors should be remunerated on a scale differing according to whether the conveyancing business be done in an action or not.

Cecil Russell, for the trustees.

Further arguments are referred to in the judgment.

KAY, J.:—

I think I must accede to the applicant's view of the meaning of the statute, which is certainly not very easy to construe. [His Lordship having read section 2, continued.] Now grammatically the words "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master, and not being otherwise contentious business," must refer to the last antecedent, and that is "other business." "Other business" is contrasted with "business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing," therefore grammatically the exception is from other business and not from these matters of "business connected with conveyancing."

But then there are certain rules in the General Order of August, 1882, which were made in pursuance of the section, and they apply entirely, so far as I can make out, to conveyancing business as distinguished from contentious business, and there is nothing in the scale of costs contained in the schedules to the General Order

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except certain business which is strictly speaking conveyancing business. I can find nothing at all in the scale of charges which comes under the description of "other than conveyancing business" contained in the above section, unless it be the items in schedule 2, under the two headings, "Attendances," and "Journeys from home," and, judging from the context, I suppose that these were intended to be "attendances" and "journeys from home" in respect of conveyancing business, because the second schedule begins with these words, "Instructions for drawing and perusing deeds, wills, and other documents." So that the difficulty in the case seems to me to be mainly occasioned by the mode in which the rules under this section have been made, which rules do not apply to any other business than that which is ordinarily known as conveyancing business. However, I do not know that I am at liberty to construe the statute by reference to the rules, and it may be that it was not thought necessary to make any rules with respect to the other business at present. There is, however, this difficulty, that the rules in the commencement of them profess to be made in order to regulate the remuneration of solicitors not only in respect of conveyancing business but also, following the very words of the statute, "in respect of other business not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master," so that the rules, which are professedly made for the purpose of conveyancing and other business—whatever those words "other business" may mean—have provided in fact a scale of remuneration only for conveyancing business.

The two constructions of the section of the statute which are contended for are these. One is, that it means conveyancing business of every kind whether in an action or not, and business other than conveyancing, not being business in an action, &c., or contentious business, confining the exception to the "other business." The other is, that it means only such conveyancing business as is not business in an action, &c., or contentious business, extending the exception not only to the last antecedent but to all the words which precede. I have said that grammatically the former seems to me to be the true construction. But decidedly, looking at the whole language of the section, it is ambiguous, and the rule which

applies to a document of an ambiguous kind is that the Court is bound to look at the reason of the thing, and see which is the most reasonable construction.

Now, the *Solicitors' Remuneration Act*, 1881, was passed and the royal assent was given to it on the very day, the 22nd of August, 1881, on which the royal assent was given to another Act of Parliament, the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), which curtailed very much indeed, as it was intended to do, the length of conveyancing instruments. Up to that time the remuneration of solicitors for conveyancing business was calculated at so much per folio, and of course when an Act was passed curtailing the length of conveyancing documents, if the remuneration had been thereafter calculated upon the old scale the remuneration of solicitors would have been decreased, while at the same time the attention and care requisite for the settling of such documents might be very much increased. Therefore the obvious intention of the Legislature in passing the statute was to provide a different scale for calculating the remuneration of solicitors, so that it might not be unduly decreased by the change that was to take place simultaneously in the length of conveyancing documents. At the time when the two statutes were passed a solicitor was entitled to obtain remuneration for all the proceedings in an action, and if the proceedings included the settling of a conveyance or a deed of settlement, or any other kind of deed, he got his remuneration in respect of the deed under the old scale. Now, any such deed as that has been cut down, and unless the new scale of charges is to be applied to it, he will receive less in respect of a conveyance settled in an action than he would have received before. He will get all the same costs in respect of the action that he would before, but he will get less remuneration in respect of any deed settled in the action. Is there any reason why that should be? Obviously the fact that he gets remuneration from the other costs of the action can be no reason, because he got that remuneration before. There can be no reason why he should get less in respect of a deed settled in the action under the new system than he would have got before, and therefore I do not see any reason for putting a construction upon the Act which would give to a solicitor the costs of a conveyance or settle-

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ment, or other deed, settled in an action upon the old scale, which costs would be admittedly less than he would be entitled to receive if the deed had been not a deed settled in an action at all, but a deed settled without any litigation going on concerning the matter.

There is one reason given by the Taxing Master which deserves special notice. He says, "It may be remarked that by having the sanction of the Judge in Chambers to all these transactions, the solicitor incurs no responsibility and simply acts under direction." I am not quite sure about that, because it is possible that a solicitor may be guilty of such negligence in conducting the matter of a deed or settlement settled in Chambers, as to make him liable in an action for negligence, notwithstanding that the deed professed to be settled by the Court. The Court acts always upon the instigation of the solicitors employed in the matter, and suppose that by reason of the exceeding negligence of the solicitor employed by the plaintiff in the action, a deed of settlement should be settled and passed in a form which omitted some of the provisions which the conveyancing counsel had recommended should be inserted in it, is it to be said that the solicitor is relieved from responsibility? I do not think so. There are many cases in which a solicitor would not be relieved from responsibility, although the deed was formally settled in Court, if the deed happened to be in a wrong form owing to his negligence.

Therefore I do not entirely accept the view of the Taxing Master on that point. But besides that there is another answer, viz., that the trouble of the solicitor and the time taken up, the instructions drawn by him, and all the other matters connected with the deed and the perusing of the deed on behalf of the client, have all been done by him just the same, or very nearly the same as if the deed was settled out of Court. Why should he not be remunerated for that time and trouble on the same scale as he would be if the deed were settled out of Court? I confess I do not see. Therefore it seems to me that if there be any ambiguity in the construction of the statute—and I am far from saying it is as clear as it might be—I ought to adopt that which is the reasonable construction, looking at the subject matter to which it is to be applied; and as I see no sufficient

reason why a solicitor should not be remunerated on the same scale whether the deed be settled in an action or not in an action, I think that the proper construction to put upon the statute is that it refers to conveyancing matters which take place in an action as well as to those out of Court, and that the exception is only from "other business," that is from other business not being conveyancing business, as to which it may be at some time, if it has not been already, the duty of the persons making the rules to provide a scale of charges.

The order therefore, will be that the Court being of opinion that the costs in question ought to be taxed under the *Solicitors' Remuneration Act*, 1881, the matter be referred back to the Taxing Master for him to review his taxation.

Solicitors: *Day & Cather; Senior, Attree, & Johnson*, agents for *Hunt, Currey, & Nicholson, Lewes.*

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CATTON *v.* BENNETT.

[1883 C. 984.]

Practice—Contribution or Indemnity—Rules of Supreme Court, 1883, *Order* XVI., *r.* 55—*Third Party, Notice to—Claim for Indemnity from Co-Defendant.*

An action by a vendor against the purchaser of a house and premises, and the auctioneer who advertised and sold them, for specific performance of the contract or damages. The purchaser stated that he was induced to purchase the property in consequence of the advertisement in the newspapers inserted by the auctioneer, representing that the purchase-moneys would be allowed to remain on mortgage. The representation was alleged to have been unauthorized, and the purchaser applied by summons under Rules of Supreme Court, 1883, Order XVI., r. 55, for leave to serve his co-Defendant —the auctioneer—with a notice claiming indemnity from him against the claim of the vendor.

Held, that this was not a case for indemnity within r. 55, and that the summons must be dismissed.

Pontifex v. *Foord* (1) followed.

ADJOURNED SUMMONS.

The action of *Jane Catton*, commenced on the 6th of March, 1883, was as vendor of certain freehold property against *H. Bennett*, the

(1) 12 Q. B. D. 152.

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purchaser, and *Richard Smith*, an auctioneer, who offered the property for sale, and to whom a sum of £500 deposit money was paid, for the specific performance of an agreement by *H. Bennett* made the 26th of September, 1882, for the purchase of the property for the sum of £4000, or in the alternative for payment to the Plaintiff of the sum deposited as liquidated damages for breach of the agreement pursuant to a clause therein.

H. Bennett delivered his defence and counterclaim on the 2nd of July, 1883, and therein he admitted his agreement, and alleged that he had been induced to enter into it by an advertisement inserted in a local newspaper by *R. Smith*, wherein, after a description of the property, a family and commercial hotel and premises, it was set forth that "the trade is thoroughly genuine, no goodwill is asked for, and the whole of the freehold can remain on mortgage. The valuation, about £1500, will be all the cash necessary to arrange possession with."

H. Bennett alleged that he signed the agreement on the full understanding between him and *R. Smith*, as the agent of Mrs. *Catton*, that the purchase-moneys would be allowed by her to remain on mortgage. He stated his willingness to perform the contract on those terms, and by counterclaim he asked for rescission of the contract, repayment of the deposit moneys, and costs.

Jane Catton on the 23rd of July, 1883, delivered her reply denying that *R. Smith* had any authority from her to make any statement to, or come to any understanding with, *H. Bennett* that the purchase-moneys or any part thereof could remain on mortgage.

On the 20th of February, 1884, *H. Bennett* took out a summons claiming to be entitled to indemnity from *R. Smith* against the claim of the Plaintiff, and asking pursuant to Rules of the Supreme Court, 1883, Order XVI., r. 55, that notwithstanding his defence had been delivered he might be at liberty to issue a notice of his claim; and the summons having been adjourned into Court now came on to be heard.

Kekewich, Q.C., and *D. L. Alexander*, for the summons, submitted that *H. Bennett* would, if the Plaintiff succeeded in the action, be entitled to indemnity from *R. Smith*, who would be

liable for the representation, which he had no authority to make, that the purchase-moneys could remain on mortgage. *Bennett* would be entitled to be paid for any loss which he might suffer by the action. The defence was delivered when the Rules of Court, 1875, in which there was contained no provision for the determination of a claim to contribution or indemnity as between co-Defendants, but only as between third parties, were in operation. *Bennett* could now, however, under Rules of Supreme Court, 1883, Order XVI., r. 55, which came into operation in October, 1883, ask to be allowed to serve this notice upon his co-Defendant notwithstanding the previous delivery of his defence and counterclaim.

The cases of *Bagot* v. *Easton* (1); *Marner* v. *Bright* (2); *Supreme Court of Judicature Act*, 1873, s. 24, sub-s. 3; Rules of Court, 1875, Order XVI., r. 17; and *Webster's* Dictionary "Indemnity," were referred to.

Charles G. Ellis, for the Defendant *Richard Smith*, contended that the claim was not, within the Rules of Supreme Court, 1883, Order XVI., r. 55, one for indemnity. From rule 55 had been omitted the words "or any other remedy or relief over against any other person," which were in Rules of Court, 1875, Order XVI., r. 17, and therefore the new rule was confined to cases of contribution or indemnity in the strict sense: *Pontifex* v. *Foord* (3). A right to contribution or indemnity must arise out of contract, but the claim of *Bennett* was for damages for a tort, and the measure of damages would not necessarily be the same as the sum which might be recovered in the action. There might have been disbursements when the agreement was entered into. *Bennett* might have made this claim when he delivered his defence and counterclaim; but it was now made after the action had been in the list for trial some three or four months, and even if it were a case for contribution or indemnity the order asked for should not be made at this stage of the proceedings.

The cases of *Furness* v. *Booth* (4); *Harris* v. *Gamble* (5); and

(1) 11 Ch. D. 392.
(2) Ibid. 394, n.
(3) 12 Q. B. D. 152.
(4) 4 Ch. D. 585.
(5) 6 Ch. D. 748.

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Hutchison v. *Colorado United Mining Co.* (before Mr. Justice *Mathew* in Chambers, February 12, 1884), were referred to.

Kekewich, in reply, said the decision in *Pontifex* v. *Foord* (1) did not govern this case, and that the evidence which would be necessary in trying the issue before the co-Defendants would be almost identical with that required to try the issue between the Plaintiff and *Bennett*, therefore the leave asked for should be granted.

KAY, J.:—

The difficulty in this case, which is not at all slight, arises from the form in which the new rule 55 (Order XVI.), has been drawn, as contrasted with the former rule 17, which was "where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person." Rule 55 has omitted the words "or any other remedy or relief over." The omission indicates very clearly an intention on the part of the framers of the new rule to confine the third party procedure to cases of contribution or indemnity, and the question here is whether this is a case for either as distinguished from "any other remedy or relief," words which are not in the new rule 55, under which this application is made. This rule sets forth that "where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action."

It may be observed that the material words are the same as in the former rule, "contribution or indemnity," but the rule, as I understand, is an entirely new one. When this action was commenced and the statement of defence was delivered no rule similar to the one I have just read existed. It came into operation at the end of the last long vacation; and under it an application is now

(1) 12 Q. B. D. 152.

made for leave to give the notice mentioned in the rule, although the time has elapsed, because when the time for giving the notice under the Rules of Court, 1875, expired, the new rule (55) had not been framed. The real question therefore which I have to consider is whether in this case the claim which is sought to be made by one Defendant against the other comes within the words "contribution or indemnity." [His Lordship stated the facts as above set forth, and continued:—] The Plaintiff raises the issue that she never gave *Richard Smith* authority to insert the advertisement mentioned in any newspaper. Suppose it turns out that this was quite true, and that for some reason, which I cannot speculate upon, the relief sought by the Plaintiff is given against *Bennett*, either for specific performance or for payment of the sum of £500 as liquidated damages — I will assume the latter alternative, payment of £500 for liquidated damages—what will then be the claim of *Bennett* against *Richard Smith*, if it be proved on the trial that he had no authority to insert the advertisement, that he did in fact insert it and that it misled the Defendant *Bennett* and induced him to enter into the agreement? The claim of *Bennett* against *Richard Smith* will be shortly this: By reason of this statement of yours I have been induced to enter into the contract in the belief that you had authority to make the statement and that the Plaintiff would carry it out. It seems that you had no authority, and by reason of such act of yours I have suffered damage to the extent of £500, and I now ask as against you, that you repay to me that damage and the costs in the action which I have been ordered to pay to the Plaintiff." Is that indemnity or not? It is clearly not indemnity under any contract. But is indemnity confined to cases where one of two parties has contracted to indemnify the other? I am reluctant to say that such is the meaning of the order, and it seems to me to be a matter of very considerable doubt. One test which I may apply is this: Suppose the action to be tried and the issue to be tried, the evidence as to whether there was authority or not would have to be given at the hearing in the presence of all parties—Plaintiff and Defendants—and I am at a loss to see at present what other evidence will be required as between the co-Defendants upon the issue sought to be raised by *Bennett*. It may

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be suggested, as was urged at the Bar by Mr. *Ellis*, that the Defendant *Bennett* may say that the £500 which he had been ordered to pay was only part of the damages; that there had been other damages besides the costs of the action, other damages quite outside the action, and that there might be evidence directed to the question of the further damages which he asked to recover against *Richard Smith*. But, except that, I do not see, and it has not been suggested, that there would be any other evidence required upon the issue raised between the co-Defendants than the evidence which necessarily must be given on the issue raised between the Plaintiff and the Defendant *Bennett*. If no further evidence would be wanted upon the issue between the co-Defendants, it certainly seems a very inconvenient course to oblige that issue to be tried in a separate action. That would in fact oblige all the evidence to be taken over again, and I accept that as a good test whether the case is one which ought to be tried under the third party rule. On that ground, the case seems to be a proper one to be tried under the third party rule, because undoubtedly, the bulk of the evidence would necessarily be given on the issues between the Plaintiff and Defendants.

Then is it strictly indemnity? As to that there is very great difficulty. It was said it was not indemnity because it is a mere claim for damages which would not necessarily be the same sum as that which might be recovered in the action. On that point reference was made to the case of *Pontifex* v. *Foord* (1), in which the action was for breach of a covenant to repair by a lessor against a lessee, and leave was obtained to serve a third party, an under lessee, whose underlease contained a covenant which in terms was precisely similar to the covenant in the original lease, and the defendants' case against the third party was: "You have broken the covenant since your underlease and therefore I claim against you the like damages which have been recovered against me in the action."

In the course of the argument it was said that the covenants in the underlease were substantially to indemnify, and Baron *Pollock* said (2): "That does not seem to me to be the true construction of the underlease in this case. The words of the

(1) 12 Q. B. D. 152.

(2) 12 Q. B. D. 153.

covenant may be identical, but the measure of damages is not necessarily the same. The character and age of the house are different when the underlease commences from what they were when the original lease commenced." And in his judgment, after commenting upon the rule and upon the difference between the existing rule and the old rule, the former not having in it the words which I have referred to, the learned Judge said (1): "It is common knowledge that where there is a covenant to repair such as those contained in this lease and sublease, and a surveyor is called in to make an estimate of the damages arising from non-fulfilment of the covenant, the first question he goes into is as to the character and age of the house when the tenancy commenced. The principle involved is clearly explained in the cases of *Logan* v. *Hall* (2) and *Payne* v. *Haine* (3); cases which indicate the varying effect of covenants using the same words according as the words are to be applied to an old or a new house. It seems to me that this is no case of contribution or indemnity, and therefore that the learned Judge was right in refusing to give directions, and that this appeal must be dismissed." I must take that as a decision that where the money to be paid by the third party or co-defendant is under another and different contract, and is not necessarily the same as is payable under the contract sued upon by the plaintiff—but may be less or more—it is not a case of indemnity, and yet according to the argument addressed to me, if the lessee had recovered from the under-lessee damages for breach of his covenant that would in one sense certainly have indemnified him, because the money in his pocket would lessen to that extent the loss incurred by him. A great part of the argument here has been that if in the claim which the Defendant *Bennett* desires to set up against his co-Defendant, he recovers damages, they will indemnify him to that extent against the damages which he may be ordered to pay to the Plaintiff.

I have a difficult question to decide—whether this is really a case of indemnity, and it seems to me that the decision which I have just referred to goes far to determine the question, and that the sum which might have been recovered in that case from the

(1) 12 Q. B. D. 156. (2) 4 C. B. 598.
(3) 16 M. & W. 541.

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third party was, by way of indemnity, just as much as the sum which might be recovered from this co-Defendant; and though I confess that I have a strong leaning in favour of allowing the matter to be tried, because otherwise there will be all the expense of a separate action, much of the evidence in which must be the same as will be required to try this question, yet, upon the whole, I think that the case cited must govern my decision in this case, and not seeing my way to differ from it, I hold that this is not a case for indemnity within the rule, and that the summons must be dismissed.

Solicitor for Defendant *Bennett: H. Montagu.*

Solicitor for Defendant *Smith: Robert Jenkins.*

Solicitor for Plaintiff: *Nettleship,* agent for *H. R. Allen, Halesworth, Suffolk.*

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Jan. 18.

[1883 W. 4737.]

Solicitor and Client—Retainer—Authority to issue Writ.

A retainer to a country solicitor does not justify an action in which his London agents are the solicitors on the record.

A., an illiterate woman, being desirous of knowing whether there was any balance coming to her, as administratrix of *C.*, her deceased husband, out of the proceeds of a sale by the mortgagee of property mortgaged by *C.*, gave to *B.*, a country solicitor (who had recovered judgment in an action against her, as administratrix, for a debt due to him from her deceased husband) this written retainer: "I hereby authorize you to act as my solicitor in the administration of my late husband's estate, and authorize you to investigate the accounts of the mortgagee, and take such steps as you may think proper in the matter on my behalf."

A writ was subsequently issued by a *London* firm of solicitors in the names of *A.* and *B.*, as Plaintiffs, claiming an account of the proceeds of sale of the mortgaged property and payment of the balance, the claim by *A.* being "as legal personal representative of *C.*," by *B.* "as a creditor of *C.* who had obtained judgment against *A.*, and had obtained execution by the appointment of a receiver of the balance due from *C.*"

Upon motion by *A.* that her name might be struck out of the writ as having been issued without her knowledge and without any authority on her part:—

Held, that the retainer was not sufficient to justify the issue of the writ; but, whether sufficient or not, it was a retainer to *B.*, and did not authorize the *London* firm to issue the writ in the name of *A.* as her solicitors.

MOTION on behalf of *Ann Wray*, one of the Plaintiffs named in the writ of summons issued in this action on the 29th of November, 1883, that her name might be struck out from the writ, the same having been issued without her authority, and that Messrs. *Hickin & Graham*, the solicitors by whom the writ was issued, might be ordered to pay to *Ann Wray* her costs, if any, of this action, and her costs of this application, and the costs of the Defendant *Kemp* and of the Plaintiff, *Aaron Wray*, of this application.

In November, 1882, *Ann Wray*, who was an illiterate person took out administration *de bonis non* with the will annexed to her deceased husband, *John Wray*, who died on the 23rd of August, 1881.

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The personal estate was insufficient, and the only real estate of which *John Wray* died possessed was mortgaged to *Maria Spink*, of whom the Defendant *Kemp* was the executor. In January, 1883, *Aaron Wray*, who was a creditor of *John Wray*, recovered judgment in an action against *Ann Wray*, as administratrix, for the balance of his debt, amounting with costs to about £90.

The mortgaged property was put up for sale by *Kemp*, the mortgagee, and in August, 1883, *Ann Wray*, being desirous of knowing whether there was any balance coming to her out of the proceeds of sale, gave to *Aaron Wray* the following written retainer:—

"*Bridlington Quay*, 9th Aug. 1883.

"Dear Sir,—I hereby retain you to act as my solicitor in the administration of my late husband, Mr. *John Wray's*, estate, and authorize you to investigate the accounts of the mortgagee and take such steps as you may think proper in the matter on my behalf. "*Ann Wray* (her mark).

"To Mr. *A. Wray*."

On the 23rd of August, *Aaron Wray*, with the consent of *Ann Wray*, obtained an order in his action for the appointment of a receiver of the balance of the sale money in the hands of *Kemp*, the mortgagee.

On the 20th of October the mortgaged property was conveyed to the purchaser, and *Kemp* rendered his account, shewing a balance of 13*s.* 9*d.* payable to the receiver.

On the 27th of October *Ann Wray* was informed by *Aaron Wray* that there would be nothing for her out of the proceeds of the sale, and a few days later, upon inquiry of the mortgagee's solicitor, she was told that even if there was any balance he *Aaron Wray* would claim it in respect of his judgment against her.

On the 29th of November, 1883, the writ in this action was issued by a firm of *London* solicitors in the name of *Ann Wray* and *Aaron Wray* as Plaintiffs against *Kemp*, the writ being indorsed with a claim for an account of the proceeds of sale of the mortgaged property, and payment of the balance due from the Defendant on such account, it being stated that the "Plaintiff *Ann Wray* claims as legal personal representative of *John Wray*. Plaintiff *Aaron Wray* claims as a creditor of *John Wray*, who has

obtained judgment against *Ann Wray*, and has obtained execution by the appointment of a receiver of the balance due from the Defendant."

Ann Wray, who stated that she did not know of the action until the 6th of December, now moved that her name might be struck out on the ground that she had given no authority, and never intended to bring an action against *Kemp*, or to enter into litigation with him in respect of his dealings with the mortgaged property or his account in connection therewith. She also stated that she never gave any retainer or authority whatever to the *London* firm, and had not even heard of them when the writ in the action was issued.

Ince, Q.C., and *Bardswell*, in support of the motion :—

The retainer of the 9th of August, 1883, was clearly insufficient to authorize the commencement of an action in the name of *Ann Wray*. To justify a solicitor in commencing an action he must obtain a written authority, and that written authority ought to be sufficient and explicit; and it is not sufficient that he obtains an authority to take proceedings to get an account: *Atkinson* v. *Abbott* (1). In any case this retainer, which was given to *Aaron Wray*, cannot justify the firm of *London* solicitors in issuing a writ in their own names as solicitors, and not as agents of *Aaron Wray*.

Bunting, contrà :—

The retainer in this case, which authorized *Aaron Wray* to investigate the account and take such steps as he might think proper in the matter on behalf of *Ann Wray*, was sufficient authority for bringing the action in her name, and further, there is evidence that Mrs. *Wray* gave express verbal instructions for the action.

[CHITTY, J.:—As there has been writing you cannot rely upon a verbal retainer.]

In *Atkinson* v. *Abbott* (1) the retainer, after the lapse of three years, was considered to have been exhausted.

(1) 3 Drew. 251.

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[CHITTY, J.:—The ground of the decision in that case appears to have been that the authority was insufficient to justify the filing of the bill, not that the retainer was exhausted. But how can you justify the commencement of this action by other solicitors?]

They were the *London* agents of *Aaron Wray*.

[CHITTY, J.:—Then it is no retainer. If I employ *Jones* as my solicitor I do not employ *Smith*.]

CHITTY, J.:—

This case is to be decided on a very short point. The writ issued in this action is not a writ in which *Aaron Wray's* name appears as solicitor issuing the writ, but it is issued in the names of some other gentlemen, who are generally employed by *Aaron Wray* as his *London* agents, and issued by them, not as agents for *Aaron Wray*, but as the solicitors issuing the writ. It is said that in substance those solicitors have been retained by the applicant, inasmuch as it is the usual practice when a country solicitor has been retained, to substitute the name of the *London* agents for that of the country solicitor. That may be a perfectly reasonable practice as between the solicitors themselves, but it does not make the *London* agents the solicitors of the party who gave the retainer to the country solicitor. The case is really disposed of on that short point. A man employs a solicitor because he has confidence in him, and it is that confidence which renders it necessary for a litigant to have the assistance of one solicitor rather than another. I would add that on the question whether the retainer to *Aaron Wray* was sufficient, I agree with what was said by *Kindersley*, V.C., in *Atkinson* v. *Abbott* (1), that a solicitor must be very careful to have his retainer very carefully worded, especially when given on behalf of an ignorant, uneducated person. The Vice-Chancellor did not think the retainer in that case sufficient, and the case was decided on that ground, and not, as has been suggested, on the ground that the retainer was exhausted. This retainer, signed by *Ann Wray*, who appears to be an ignorant woman, is not so

(1) 3 Drew. 251.

strong as the retainer in *Atkinson* v. *Abbott* (1), which requested the solicitor "to proceed against the trustees and executors, and to take such proceedings, &c."—words which have a certain legal ring about them—but was held insufficient. Putting it at the best, this is an ambiguous document, and, in my opinion, is not sufficient to justify the issue of this writ; but, whether that be so or not, the first objection is fatal. I may add that I do not for an instant doubt that the *London* solicitors acted in perfect good faith. There must be the usual order that *Ann Wray's* name be struck out.

Solicitors: *Burton, Yeates, & Hart,* agents for *Luke White, Great Driffield; Hickin & Graham.*

F. G. A. W.

PARISH OF SUTTON TO CHURCH.

Charity—Power of Sale—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78) —*Charitable Trusts Act,* 1853 (16 & 17 *Vict. c.* 137), *ss.* 24–26 [*Revised Ed. Statutes, vol. xi., p.* 988]—*Charitable Trusts Amendment Act,* 1855 (18 & 19 *Vict. c.* 124), *s.* 38 [*Revised Ed. Statutes, vol. xii., p.* 795]—*Allotments Extension Act,* 1882 (45 & 46 *Vict. c.* 80), *ss.* 4, 5, 11, 15—*Allotment Act* (2 *Wm.* 4, *c.* 42) [*Revised Ed. Statutes, vol. vii., p.* 26].

The *Allotments Extension Act,* 1882, has not taken away from the Charity Commissioners the power of authorizing a sale of charity lands vested in them under the *Charitable Trusts Act,* 1853, and the *Charitable Trusts Amendment Act,* 1855.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act,* 1874, and the question was whether the vendors, the rector, churchwardens and overseers of the parish of *Sutton,* could make a good title to the piece of land in respect of which they had entered into a contract for sale with Mr. *Church,* and which had been allotted to them under a local and personal Act (49 Geo. 3, c. lxv.) being an Act for inclosing lands in the manor and parish of *Sutton* in the county of *Surrey.*

By the 20th section of that Act it was enacted that the

(1) 3 Drew. 251.

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Commissioners appointed by that Act after making certain allotments should out of the residue of *Sutton Common* allot such plots as they should think proper, not exceeding twenty acres nor less than ten acres, for the benefit of the poor of the said parish not receiving alms, in lieu of and in full recompense and satisfaction for any and every right which might be claimed by such poor respectively, of cutting furze or bushes on the said waste lands, downs and grounds, or any part thereof, for fuel, which said last-mentioned plot or plots of the said common called *Sutton Common* should be and the same was and were thereby vested in the rector, churchwardens and overseers of the poor of the said parish, and their successors for the time being for ever, upon trust to be by them respectively from time to time let by public auction for any term or number of years not exceeding fourteen years, at the best rent or rents that could be reasonably had or gotten for the same, with and upon all usual, proper and necessary covenants and conditions, and which said rent or rents were to be by the rector, churchwardens and overseers of the poor for the time being, from time to time applied or laid out in the purchase of fuel for the use of the poor of the said parish not receiving alms, or otherwise for their benefit, and in case of any surplus after such an allowance of fuel should be made as should by the said trustees be considered a reasonable and proper allowance, to be distributed to and amongst the poor of the said parish not receiving alms in such proportion and manner, and at such times as the said rector, churchwardens and overseers for the time being of the same parish should in their discretion think reasonable and proper.

The contract for sale was approved of by the Charity Commissioners, and an order for sale was made by them in the usual way, but an objection was raised on the part of the purchaser that under the *Allotments Extension Act*, 1882, the Chief Commissioners had now no power to authorize a sale.

Romer, Q.C., and *F. T. Procter*, for the vendors in support of the summons :—

Under sect. 24 of the *Charitable Trusts Act*, 1853, and sect. 38 of the *Charitable Trusts Amendment Act*, 1855, the trustees had,

with the approval of the Charity Commissioners, a power of sale over those lands, and we say that the *Allotments Extension Act*, 1882, does not directly or by implication repeal those statutes. We submit that there is no irreconcilable inconsistency between the *Charitable Trusts Acts* and the *Allotments Extension Act*, 1882, so as to amount to a repeal of the previous Acts: *Hill* v. *Hall* (1).

The *Allotments Extension Act*, 1882, is an extension of an Act 2 Wm. 4, c. 42, which we submit it is not necessary to discuss, as these lands are not within it, but if they were, then we say that was not a disabling Act within sect. 38 of the *Charitable Trusts Amendment Act*, 1855, and if it was the power of sale is expressly preserved by that section.

Macnaghten, Q.C., and *Alfred Smith*, for the Purchaser:—

If the vendors are right in their construction of the Acts then the trustees of a charity like this will always be able to render the *Allotments Extension Act*, 1882, which was passed for the express purpose of benefiting the labouring classes, inoperative. We submit that the whole scope of the Act of 1882 shews that the power of sale is taken away.

Procter, in reply.

The several sections of the Acts of Parliament referred to in the argument are fully set out in the judgment.

CHITTY, J.:—

The question in this case is whether the trustees of certain land have power to sell it.

The land in question was allotted under a local inclosure Act (49 Geo. 3, c. lxv.) for the use of the poor. The mode of allotment was as follows:—[His Lordship read the section of the Act above set out.]

Now the first question is whether the trustees had a power of sale over the land in question when the *Allotments Extension Act*, 1882, came into operation. Sect. 24 of the *Charitable Trusts Act*, 1853, is as follows:—"Upon application to the said board

(1) 1 Ex. D. 411.

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(meaning the Charity Commissioners) by the trustees or persons acting in the administration of any charity, representing to the said board that, under the special circumstances of any land belonging to the charity, a sale or exchange of such land can be effected on such terms as to increase the income of the charity, or would otherwise be advantageous to the charity, such board may, if they think fit, inquire into such circumstances, and if after inquiry they are satisfied that the proposed sale or exchange will be advantageous to the charity may authorize the sale or exchange, and give such directions in relation thereto, and for securing the due investment of the money arising from any such sale, or by way of equality of exchange for the benefit of the charity, as they may think fit." That section in fact vests in the board a power of sale, for it reposes in them a power of authorizing a sale (which they have done in this case), and they are not to give their sanction merely because they are set in motion by the trustees, but they are to be satisfied that the proposed sale will be advantageous to the charity.

Sect. 26 of the same Act enacts that "The leases, sales, exchanges, and other transactions authorized by such board under the powers of this Act shall have the like effect and validity as if they had been authorized or directed by the express terms of the trust affecting the charity."

It appears to me that sect. 24 applied to the land in question, and therefore that after the *Charitable Trusts Act*, 1853, came into operation jurisdiction was given to the Charity Commissioners to authorize a sale, as the vendors contend. Sect. 38 of the *Charitable Trusts Amendment Act*, 1855, gives further effect to that jurisdiction. That section enacts that "all leases, sales, exchanges, partitions, and transactions authorized by the board under the principal Act, or this Act, shall be valid and effectual, notwithstanding the Act of the 13th Eliz. c. 10, the Acts of the 14th of the same Queen, caps. 11 and 14, the Acts of the 18th of the same Queen, caps. 6 and 11, the Act of the 39th of the same Queen, cap. 5, and the Act of 21st Jac. 1, c. 1, or any disabling Act applicable to the charity, the trusts whereof shall be the subject of any such transaction." I have not been referred in detail to the Acts mentioned in that section, but I understand they are special

Acts disabling certain ecclesiastical persons and certain hospitals and other corporate bodies from alienation and from leasing, except as in the several Acts provided, and do not affect the land in question.

An argument has however been addressed to me to the effect that this land is within the provisions of a disabling statute namely, the Act of 2 Wm. 4, c. 42 (mentioned in the preamble to the *Allotments Extension Act*, 1882), which enacts in sect. 1, that it shall and may be lawful for trustees of allotments within the Act, together with the churchwardens and overseers of the poor, and they are thereby required, to let portions of any such allotment to such industrious cottagers as the section defines as shall apply for the same in the manner therein mentioned. Assuming that the land in question is within 2 Wm. 4, c. 42, is that a disabling Act so as to require the operation of the 38th section of the *Charitable Trusts Amendment Act*, 1855, to preserve the power of sale? In my opinion it is not. I can see no irreconcilable inconsistency between an Act giving the Charity Commissioners a power of sale, or a power of authorizing a sale, and an Act giving the trustees and others a power in the nature of a trust to let the lands to industrious cottagers. I think the power or trust for letting can lie alongside the power of sale.

Even if the Act 2 Will. 4, c. 42, were treated as a disabling statute I am of opinion that the power of authorizing a sale would be preserved by sect. 38 of the *Charitable Trusts Amendment Act*, 1855.

It follows, therefore, that when the *Allotments Extension Act*, 1882, came into force there was an existing power of sale over this land, and the next question then is whether that power was taken away by the last-mentioned Act. It is admitted that it was not taken away in express terms, but it is argued that it was taken away by implication.

What then is the rule of construction to be applied? The statutes must be read together in order to see if they can stand together, and if they can so stand then there is no implied repeal.

Now the *Allotments Extension Act*, 1882, begins by reciting the Act, 2 Will. 4, c. 42, but the latter part of the preamble and the

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words of sect. 4 are very strong. By sect. 4 it is enacted that "all trustees in whom lands are vested, or by whom the same are held or managed for the benefit of the poor of any parish or place in or adjoining to that in which such lands are situate, and whereof the rents or produce are distributed in gifts of money, doles, fuel, clothing, bread, or other articles of sustenance or necessity, shall, where such lands are not otherwise used for the benefit of the parish in which it is situate as a recreation ground, or otherwise for the enjoyment or general benefit of the inhabitants, take proceedings, subject as hereinafter mentioned, for letting such lands in allotments to cottagers, labourers, and others." The words of that section are very wide, and in my opinion they cover lands held under sect. 20 of the local Act (49 Geo. 3, c. lxv.), and that will be so even if such land is not within the Act, 2 Will. 4, c. 42, for the object of the Act of 1882 is clearly to extend that Act.

Then the 5th section enacts that "if any of the said lands shall be found to lie at an inconvenient distance from the residences of any cottagers or labourers it shall be lawful for the trustees to let such lands, or any part thereof, for the best rent that can be procured for the same, and to hire in lieu thereof, for the purposes of this Act, other land more favourably situated for allotments to the poor of the parish or place for whose benefit such lands are held in trust." By sect. 11 the trustees are to be at liberty if, in their opinion the lands shall, either on the ground of distance, or on any other ground, be so unsuitable for allotments that no part thereof can be usefully set apart for the purposes of the Act, to apply to the Charity Commissioners for a certificate to that effect, which certificate, however, is capable of being revoked, but to be binding till revoked. Upon the trustees, therefore, obtaining a certificate from the Commissioners the lands can be taken, at all events temporarily, out of the operation of the Act.

The working of the Act is to a great extent committed to the Charity Commissioners, and I think, looking at the whole Act, it would be unreasonable to say that there is any implied intention of depriving them of existing powers.

In my opinion the only section of the Act which raises a real

difficulty is the 15th, which is as follows: "Nothing in this Act contained shall be taken to impair or alter any powers conferred on the trustees of any charities or the Charity Commissioners by the *Endowed Schools Acts* or the Acts amending the same." It is said that I must hold by inference that powers conferred on the Charity Commissioners by other Acts are taken away. Probably the *Endowed Schools Acts* contain provisions upon which the Legislature considered that difficulties might arise. These Acts have not been read to me, but I think that must be the case, and I do not feel bound to draw the inference that the Legislature anticipated such a conflict between the *Allotments Extension Act*, 1882, and these sections of the *Charitable Trusts Acts* to which I have referred as would repeal the latter.

Solicitors: *Blewitt & Tyler; Jackson & Prince.*

G. M.

In re HARVEY.

WRIGHT *v.* WOODS.

[1881 H. 3802.]

Practice — Administration Action — Costs — Solicitor and Client — Residuary Legatee Plaintiff — Insufficient Estate.

A residuary legatee plaintiff in an administration action is entitled to his costs as between solicitor and client where the estate is insufficient for payment of legacies, provided it is sufficient for payment of debts, but not otherwise.

FURTHER CONSIDERATION.

This was an action for the administration of the real and personal estate of a testatrix, *Mary Ann Harvey*, deceased, the Plaintiff being the residuary legatee, and the Defendant the sole trustee and executor of the will.

From the Chief Clerk's certificate it appeared that the estate would certainly be insufficient for payment in full of the legacies bequeathed by the will, and there also appeared to be some probability that the estate would be insufficient for the payment in full of the costs of the action, and the small amount of the

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scheduled debts—under £10—then due. The greater part of the debts to the amount of about £61 had been paid in full by the executor subsequently to the judgment, but before the date of the certificate. Upon the action coming on for further consideration as a short cause, the minutes proposed to tax and pay the Plaintiff's and Defendant's costs as between solicitor and client, and to provide for an apportionment of all the debts, both those already paid and those remaining unpaid, in the event of a deficiency, and for the refunding by the Defendant of what should in that event be found to have been overpaid by him; but the question arose whether, under the above circumstances, the Plaintiff was entitled to more than party and party costs.

G. I. Foster Cooke, for the Plaintiff, submitted that he was entitled to costs as between solicitor and client, and referred to *Cross* v. *Kennington* (1); *Burkitt* v. *Ransom* (2); *Waldron* v. *Frances* (3); *Thomas* v. *Jones* (4); *Seton* on Decrees (5). There was no *constat* that the estate was insufficient for payment of the debts in full over and above the costs of the action.

CHITTY, J., said he would only give the Plaintiff solicitor and client costs provided the estate was cleared from debts.

Badcock, for the Defendant, offered to give an undertaking to pay the small remaining amount of debts, whereupon

HIS LORDSHIP made the order allowing both parties their costs as between solicitor and client, the Defendant undertaking personally to pay the scheduled debts if the estate proved insufficient.

Solicitors: *Davidson & Morriss; Gregory, Rowcliffes, & Co.*

(1) 11 Beav. 89.
(2) 2 Coll. 536.
(3) 10 Hare, App. x.
(4) 6 Jur. (N.S.) 391.
(5) 4th Ed. p. 875.

G. I. F. C.

PETER *v.* THOMAS-PETER.

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Feb. 16; *March* 27.

[1875 P. 181.]

Practice—Rules of Supreme Court, 1883, *Order* XVII., *rr.* 4, 5—*Infant—Carrying on Proceedings—Supplemental Action—Form of Order.*

Where proceedings have been taken in an action after it has become defective by the birth of an infant who is a necessary party thereto, the infant should be made a party by the common order under Rules of Supreme Court, 1883, Order XVII., rule 4, to carry on proceedings between the continuing parties and such infant, and the order (as in *Seton* (1)) should go on to direct an inquiry whether any proceedings affecting the interest of the infant have been taken in the action since his birth, and, if so, whether it will be fit and proper and for the benefit of the infant that he should be bound thereby. And if so certified the infant to be bound accordingly.

If such inquiry be answered in the negative, the plaintiff or person having the conduct can still proceed by supplemental action.

ADJOURNED SUMMONS raising the question as to the proper course to be taken for bringing before the Court an infant born after judgment in an action, and, from his interest in the subject-matter, a necessary party thereto, and for binding him by proceedings taken in the action since his birth, but before he had been made a party to the action.

In October, 1875, the bill was filed to administer the trusts of the will of *J. T. H. Peter*, who devised his real estates to his wife (the Plaintiff) for life, with remainder to the eldest son of *J. L. Peter* for life, with remainder to his eldest and other sons successively according to age, in tail male, and in default of sons or heirs male to his eldest daughter and other daughters, and to each of their respective heirs male in tail successively.

At the death of the testator, and when the suit was instituted, the Defendant, *J. F. Thomas-Peter*, was the eldest son of *J. L. Peter*, and unmarried. The usual administration judgment was given in the suit on the 2nd of December, 1876. *J. F. Thomas-Peter* was married on the 1st of August, 1878, and on the 17th of July, 1879, a daughter was born to him. On the 4th of February, 1880, the common order was obtained directing inquiries whether it was for her benefit that she should be bound

(1) Page 1527, Form 3.

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by the proceedings since the commencement of the suit, and on the 7th of May, 1880, the Chief Clerk certified that it was for her benefit.

On the 8th of May, 1882, the suit was heard on further consideration, and on the 9th of September, 1882, a son, *J. F. T. Peter*, was born to the Defendant *J. F. Thomas-Peter*.

The fact of the son's birth had only recently become known to the parties having the conduct of the cause, and since his birth divers proceedings in Chambers had been had in the action.

In these circumstances a petition was presented in December, 1883, asking for a similar order against the infant son to that which was obtained in 1880 against the infant daughter, whose interest as tenant in tail in remainder had become displaced by the birth of her brother. The Registrar having raised the question whether the common order under Rules of Supreme Court, Order XVII., rule 4, was sufficient, this summons, which was now adjourned into Court, was taken out by the parties having the conduct of the action.

Daw, in support of the summons:—

The question raised by this summons is whether the infant first tenant in tail in remainder, and therefore interested in the proceedings and a necessary party to the action, can be bound by the common order to carry on proceedings obtained under Rules of Supreme Court, 1883, Order XVII., rule 4, in respect of proceedings which have been taken in the action since his birth by the parties having the conduct of the cause in ignorance of his having come into *esse*, or whether a supplemental action is necessary. The new rule is almost identical with Rules of Supreme Court, 1875, Order L., rule 4, which again is similar to 15 & 16 Vict. c. 86, s. 52, with the addition of these words, "or by reason of any person interested coming into existence after the commencement of the action," which apply directly to the present case. In *Capps* v. *Capps* (1) and *Auster* v. *Haines* (2), it was held that there was no jurisdiction to make a supplemental order under 15 & 16 Vict. c. 86, s. 52, bringing before the Court

(1) Law Rep. 4 Ch. 1.

(2) Law Rep. 4 Ch. 445.

infants born after the decree, and directing them to be bound by proceedings taken after their birth, and in *Haldane* v. *Eckford* (1) Vice-Chancellor *Bacon* said that, "if any proceeding or step in the action had been taken since the birth of the child he would have followed the two cases cited (above) and should have considered a supplemental action necessary; but inasmuch as nothing had occurred to alter the relative position of the parties prior to the birth of the infant he would make an order under Rules of Court, 1875, Order L., rule 4." Though a *dictum* only, that was a clear intimation of opinion that if any proceedings had taken place in the action after the birth of the infant a supplemental action would have been necessary.

CHITTY, J., was of opinion, in the first instance, that this infant who came into existence after the commencement of the action would be bound by the common order made under Rules of Supreme Court, 1883, Order XVII., rule 4, as to proceedings previous to his birth, but that a supplemental action was necessary in order to bind him by any proceedings affecting his interest which had been had in the action during the intermediate period during which he ought to have been a party.

March 27. CHITTY, J., now stated that after making inquiries of the Chief Clerk and the Registrar, and having reconsidered the whole matter, he proposed to state his views, which were intended to supersede any former observations by him upon this matter. His Lordship then gave judgment as follows:—

The question is, what is the proper course to be adopted when an infant who is a necessary party to the action has come into existence after the date of the judgment, and proceedings have been taken under the judgment since the birth of the infant, and before any order is applied for to add him as a party. This question is one of some importance in practice. The rule which now relates to this subject is Order XVII., rule 4, which contains the words "or by reason of any person interested coming into existence after the commencement of the cause or matter." These words are also contained in the 4th rule of Order L., which came

(1) W. N. (1879) 80.

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into operation on the 1st of November, 1875, but the provision was new, and similar words were not contained in 15 & 16 Vict. c. 86, s. 52, on which section *Capps* v. *Capps* (1) and *Auster* v. *Haines* (2) were decided by Lord Chancellors *Hatherley* and *Cairns*. After these decisions there were several other decisions.

In *Browne* v. *Huggins* (3) the late Master of the Rolls suggested that the common order might be obtained under the *Chancery Amendment Act* binding the infant by all proceedings up to the time of his birth, and then taking a summons out against the infant; and when the infant had been thus made a party a summons might be taken out calling on him to shew cause why he should not be bound by the proceedings subsequent to his birth, and Vice-Chancellor *Hall* acted upon this suggestion in *Occleston* v. *Fullalove* (4).

Both these decisions were under sect. 52 of the Act of 1852 (15 & 16 Vict. c. 86), and before the rules of 1875 came into operation. After the *Judicature Act* Vice-Chancellor *Hall*, in *Scruby* v. *Payne* (5), and the late Master of the Rolls in *Williams* v. *Williams* at Chambers, on the 19th of May, 1866, acted upon the view expressed in *Browne* v. *Huggins*. The matter was afterwards again brought before the late Master of the Rolls, and he settled the form, which is printed in the last edition of *Seton* (6). The note, however, is in error in stating that the form was settled for use in his Chambers, as it was settled by the Master of the Rolls for use in the Rolls Office, that is, for general use. I have seen the original draft, and there is an alteration in pencil, which looks like an alteration made by the Master of the Rolls in his own handwriting. I have no doubt that order was carefully settled by him and settled for general use. The order was actually made in this case upon the birth of a daughter in 1879, and in some other cases to which I need not refer, but I have seen the papers in Chambers.

A similar point came before Vice-Chancellor *Bacon* in 1879 in *Haldane* v. *Eckford* (7), which is mentioned in *Seton* (8); but the

(1) Law Rep. 4 Ch. 1.
(2) Ibid. 445.
(3) W. N. (1875) 59.
(4) W. N. (1875) 92.
(5) W. N. (1876) 227.
(6) Page 1527, Form 3.
(7) W. N. (1879) 80.
(8) Page 1528.

Vice-Chancellor's attention does not seem to have been called to the practice which had then sprung up. [His Lordship, after reading the order from *Seton* (1), proceeded:—] No difficulty has actually occurred in practice in working out this order. A guardian is appointed and the inquiry is prosecuted in the presence of the infant, and, so far as I have been able to ascertain, the answer to the inquiry has always been that it is for the benefit of the infant that he should be bound. The Registrar, however, suggests an objection to this form of order, which is this, that it is a conditional order, and that the infant is not made a party to the action in the first instance, and he points out that an appearance cannot be entered for the infant under that form of order, and that if the infant refused to appear, the order would not work. The present practice with regard to the appointment of guardians is contained in Rules of Supreme Court, 1883, Order XVI. By rule 16 infants may defend by their guardians, and then by rule 18 an infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian is now necessary, but the solicitor applying to enter the appearance shall make and file an affidavit in the form mentioned. The difficulty which the Registrar suggests may, I think, be got over by making a slight alteration in the form of the order. It is true that it is a mere technical difficulty, but I can quite conceive that that form of order settled by the late Master of the Rolls might in some particular case lead to a difficulty.

Now if the form of the order be varied in the manner I am about to mention, generally, I think, the difficulty would be got over. In the first instance the order should be that the proceedings in the action be carried on between the plaintiffs and the defendants and the infant, and then order an inquiry to be made: an inquiry to the same effect substantially as that which is in the order, viz., whether any proceedings affecting the interest of the infant have been had in the action since his birth, and, if so, whether it would be fit and proper, and for the benefit of the infant, that he should be bound thereby; and if it should be certified that it will be fit and proper and for his benefit, then it will direct that the infant be bound accordingly. The result will

(1) Page 1527, Form 3.

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be this, that an appearance can be regularly entered for the infant under the order, the first part of which will make him a defendant in the action, and the order can then be properly served upon him. The operation of the order will be this: he is made a party, but he is not bound on the face of the order by the intermediate proceedings. The practice will then be assimilated to that where the new party is *sui juris*. He can move to discharge the order, or he can waive the objection and submit to be bound by the proceedings which have been taken in his absence, though the infant cannot. But the Court can do so if satisfied that it will be for his benefit that he should be bound by the proceedings. The infant will therefore in the first instance be regularly made a party, but not bound by the intermediate proceedings. Then comes the inquiry, and if, as almost always would be the case, the inquiry is answered in the affirmative, he will be bound. But if the inquiry should be answered in the negative, it will still be open to the Plaintiff to proceed by supplemental action, as in *Capps* v. *Capps* (1).

The order as approved by his Lordship was as follows:—

"It is ordered that the proceedings in this action be carried on as between the Plaintiffs and the Defendants and the infant *C.*

"And it is ordered that the following inquiry be made, viz.:—An inquiry whether any proceedings affecting the interest of the infant *C.* have been had in this action since his birth, and, if so, whether it will be fit and proper and for the benefit of the said infant *C.* that he should be bound thereby; And if it shall be so certified, It is ordered that the said infant *C.* be bound accordingly."

Solicitors: *Coode, Kingdon, & Cotton,* for *Coode, Shilson, & Co., St. Austell.*

(1) Law Rep. 4 Ch. 1.

F. G. A. W.

In re KEEP'S TRADE-MARK.

PEARSON, J.

1884 Jan. 26.

Trade-mark—Registration—Entry on Register of Note limiting User—Ex parte Application—Trade-marks Rules, 1883, *r.* 32.

Objections having been raised by the owner of a registered trade-mark to the proposed registration of another trade-mark for use in connection with goods included in classes for which the first mark was used, but no formal opposition having been lodged to the application for registration, an agreement was entered into between the registered owner and the applicant that no formal opposition should be lodged; that the applicant should use his mark in connection only with goods actually exported to certain specified countries; and that he would, in connection with the registration, cause a note of this restriction on the use of his trade-mark to be entered on the register.

Upon an *ex parte* application by the applicant, in pursuance of this agreement, the Court directed the Comptroller of Trade-marks to enter such a note on the register.

THIS was an application for a direction to the Comptroller of Trade-marks to enter on the register of trade-marks, in connection with the registration of a trade-mark (No. 29,898) in the name of *Frederick Keep* (trading as *Keep Brothers*), words limiting the use of the mark to certain purposes and certain localities.

On the 16th of January, 1883, *Keep* applied for the registration in respect of sundry goods in divers classes (including classes 5, 12, and 13), of a trade-mark, which was afterwards advertised in the *Trade-marks Journal* of the 3rd of October, 1883, under the No. 29,898. Messrs. *Edgar Allen, & Co.*, who were entitled to the exclusive use of a trade-mark which was registered under the No. 3295 under the *Trade-marks Registration Acts*, 1875 and 1877, in respect of goods falling within classes 5, 12, and 13, objected to the unqualified registration of *Keep's* mark, but no formal notice of opposition was lodged. On the 12th of December, 1883, an agreement was entered into between *Allen & Co.* and *Keep*, by which it was agreed that *Allen & Co.* should not oppose the registration, and *Keep* agreed that he would not at any time thereafter use the trade-mark 29,898, or any colourable imitation thereof, upon or in connection with goods comprised in classes 5, 12, and 13, except upon such goods

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actually exported to the Australian colonies, *New Zealand*, *India*, and the *Cape of Good Hope*, and would not use the mark upon or in connection with such goods in any other countries or places whatever. And it was further agreed that, on registering the mark, *Keep*, in connection with the registration, should cause a note of the restriction above mentioned on the use thereof to be entered on the register, and that, in default of his so doing, *Allen & Co.* might apply as persons aggrieved to rectify the register by the insertion of such a note, and that *Keep* should pay the costs of such application.

Keep accordingly applied to the Comptroller to enter on the register a note of the restrictions agreed upon. The Comptroller was willing to make the entry, but he thought he could not do so without an order of the Court.

An *ex parte* application was now made on behalf of *Keep* for an order directing the Comptroller to enter the proposed note on the register in accordance with the agreement. The written consent of the Registrar of Trade-marks was produced.

J. Cutler, for *Keep*:—

The Comptroller has power to make the entry under rule 32 (1) of the Trade-Marks Rules, 1883. An entry of a note similar to that which we propose was made in *In re Rabone* (2). The only distinction between that case and the present is, that there the application was made after formal opposition to the registration had been lodged. But it can make no difference that the application is made *ex parte*, in pursuance of an agreement entered into between the parties with the view of saving expense.

PEARSON, J., made the order asked for.

Solicitor: *J. S. Salaman.*

(1) Rule 32: "Upon registering any trade-mark the Comptroller shall enter in the register the date on which the application for registration was received by the Comptroller (which day shall be deemed to be the date of the registration), and such other particulars as he may think necessary."

(2) Sebastian's Digest of Trade-mark Cases, p. 395.

W. L. C.

In re STORER.

PEARSON, J.

1884

Jan. 31.

Practice—Taxation of Costs—Country Solicitor—Journeys to London.

Upon a summons by a solicitor for an order directing the Taxing Master to review his taxation of a bill of costs :—

Held, that the journeys of a country solicitor to town to attend counsel and otherwise to conduct the proceedings in an action ought to be allowed, where the solicitor had authority from his client to make these charges, but that such journeys to town ought not to be allowed simply on the principle that the country solicitor would probably be better acquainted with the subject-matter than his *London* agent.

In re Foster (1) dissented from.

THIS was an adjourned summons on the application of *E. Storer*, a solicitor, that the Taxing Master might be directed to review his taxation of a bill of costs. It appeared that Master *Skirrow*, before whom the bill of costs was taxed, had referred certain items relating to business in the House of Lords to Mr. *Adams*, the Taxing Master of that House. Mr. *Adams* thereupon disallowed particular items charged on behalf of the country solicitor for journeys to town at the rate of five guineas per day, and his expenses, to confer with counsel and otherwise to conduct the proceedings in the action. The costs were taxed as between solicitor and client.

When the matter was again brought before Master *Skirrow* these disallowances were approved by him, and Mr. *Storer* now sought to have the taxation reviewed.

Everitt, Q.C., and *Humphreys*, in support of the summons, referred to evidence which had been filed to shew that it was with the authority of his client that the journeys to town were undertaken, and that such authority was given on the express ground that the country solicitor, having conducted the proceedings in the action from the commencement, was better acquainted with the details of the transactions than his *London* agents, and they relied upon the case of *In re Foster* in support of this contention.

(1) 8 Ch. D. 598.

PEARSON, J. 1884 *In re* STORER.

Cozens-Hardy, Q.C., for the executors of the client, submitted that there was no evidence in support of any agreement on the part of the client that the country solicitor should journey to *London* to conduct the business, and that though he might be better acquainted with the details of the transactions that was no ground for his presence in *London* being requisite.

PEARSON, J. :—

To my mind it is strictly made out by the evidence, having regard to the circumstances which existed in this case, that the country solicitor had authority to make these visits to *London*, and that he was justified in making the charges included in his bill of costs. I shall therefore accede to the application, and direct the Taxing Master to review his taxation.

As to the case of *In re Foster* (1), which has been cited, I do not accede to the observation which is attributed in the report to the Vice-Chancellor: "that the country solicitor was justified in personally attending the appeal, as he was probably better acquainted with the subject-matter than the *London* agent, and that on this principle the allowance was right."

I do not think it is a rule of the Court that the costs of a country solicitor's journey to *London* ought upon all occasions to be allowed simply on the principle that he would probably be better acquainted with the subject-matter than the *London* agent. If that were the rule, it would be the case in almost every action, and if so the powers of the Taxing Masters ought to be altered, and there should be a rule giving them power to allow such costs whenever they think fit, which is certainly not the rule at present.

Solicitors: *Pritchard, Englefield, & Co.; J. Cotton.*

(1) 8 Ch. D. 598.

T. W. G.

ESSERY *v.* COWLARD.

PEARSON, J.

1884

Feb. 2.

[1883 E. 1083.]

Marriage Settlement—Non-solemnization of Marriage—Rescission of Settlement.

By a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, the property of the intended wife, which had been transferred by her to two trustees, should be held by them on trust for the benefit of the intended wife, the intended husband, and the issue of the intended marriage. The marriage was not solemnized, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother against the trustees of the settlement, to obtain a transfer of the fund to the mother:—

Held, that the contract to marry had been absolutely put an end to, and that the Court could order the stock to be transferred to the lady.

In April, 1877, a marriage had been agreed upon between *Francis Thorne* and *Jane Ryall Essery*, and by an indenture of settlement, dated the 28th of April, 1877, and made between *Thorne*, Miss *Essery*, and two trustees, it was, in consideration of the then intended marriage, declared that a sum of £486 7*s.* 9*d.* Consols, the property of Miss *Essery*, which she had transferred into the names of the trustees, should be held by them, upon trust for Miss *Essery* until the then intended marriage should be solemnized, and, from and after the solemnization thereof, upon trust for the benefit of Miss *Essery* for her life, for her separate use without power of anticipation, and after her death for *Thorne* for his life, and after the death of the survivor for the issue of the then intended marriage, as therein mentioned, with an ultimate limitation, in case Miss *Essery* should survive her then intended coverture, in trust for her, her executors, administrators, and assigns, but, if she should die during her then intended coverture, upon such trusts as she should by will appoint, and, subject to such appointment, in trust for her next-of-kin according to the statute, as if she had died intestate and without having been married. The deed contained a covenant for the settlement of any property not thereby settled, to which Miss *Essery*, or *Thorne* in her right, should at the time of the then intended marriage, or at any time during the

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then intended coverture, be or become entitled, with certain exceptions.

The intended marriage was never solemnized, but shortly after the execution of the deed Miss *Essery* went to live with *Thorne* and cohabited with him. At the time when this action was commenced there were living three children the issue of this cohabitation. The action was brought by Miss *Essery* and *Thorne*, as co-Plaintiffs, against the trustees of the settlement, claiming a declaration that Miss *Essery* was entitled to the Consols and the future income thereof, and all other (if any) the property comprised in or subject, or under the covenant for the settlement of after-acquired property, or otherwise, to become subject, to the settlement, either under the first trust therein contained, or by reason of the failure of the consideration for the execution of the deed, or otherwise; and that the Defendants might be ordered to transfer and pay the Consols and the income thereof (less costs) to Miss *Essery*.

By their statement of claim the Plaintiffs alleged that soon after the date of the settlement the agreement for the marriage was rescinded and abandoned by *Thorne*, and that there was no subsisting agreement between the Plaintiffs to intermarry with each other.

The Defendants delivered no statement of defence.

The action now came on for trial as a short cause, upon a motion by the Plaintiffs for judgment in the terms of their claim.

Everitt, Q.C., and *Solomon*, for the Plaintiffs:—

The Court has under the circumstances jurisdiction to put an end to the settlement; the consideration for it has entirely failed.

[PEARSON, J., referred to *Bill* v. *Cureton* (1). There is no legal impediment to the parties marrying now, and, if they did, the trusts would come into operation.]

That would not be the marriage contemplated at the time when the settlement was executed; the parties have clearly now abandoned the agreement to marry. A voluntary settlement, no

(1) 2 My. & K. 503.

doubt, if complete cannot be revoked, but a contract can be released by implication as well as by express words. In *Bill* v. *Cureton* (1) the settlement was made, not in contemplation of a particular marriage, but with reference to any marriage of the lady who made the settlement. That the Court has power to make the order we ask is shewn by *Thomas* v. *Brennan* (2); *Page* v. *Horne* (3); *M'Donnell* v. *Hesilrige* (4).

Morshead, for the Trustees.

PEARSON, J.:—

I think that the settlement was executed with reference to the marriage which was then contemplated by the parties, and was intended to provide for the benefit of the husband and wife, and the issue of that marriage. Under it all the issue of that marriage would have been entitled. The parties unfortunately, instead of marrying, have lived together as husband and wife without marrying, and they have had some children, though not legitimate. If the father and mother were now to marry, and this deed were to be taken as their marriage settlement, their intention to provide for all their issue would be defeated. Under the circumstances I think I am at liberty to hold that the contract to marry has been definitely and absolutely put an end to. Therefore I am at liberty to hold that the trusts are at an end, and that the Plaintiffs are entitled to the relief which they claim.

MINUTE OF ORDER:—Declare that the settlement was executed in contemplation of the then intended marriage, that the contract for marriage has been rescinded, and that the trusts declared by the settlement after the solemnization of the then intended marriage have become inoperative. Costs of Plaintiffs, and costs and charges and expenses of trustees, as between solicitor and client, to be taxed and paid out of fund. Balance to be paid or transferred to female Plaintiff.

Solicitor for Plaintiffs: *W. F. Tarn.*
Solicitors for Defendants: *Cowlard & Chowne.*

(1) 2 My. & K. 503.
(2) 15 L. J. (Ch.) 420.
(3) 11 Beav. 227.
(4) 16 Beav. 346.

W. L. C.

PEARSON, J.

1884

Feb. 11, 12, 13.

BALLARD *v.* TOMLINSON.

[1882. B. 5388.]

Underground Water—Pollution of Well—Injunction.

It being settled law that there is no property in underground water flowing in natural undefined channels, and that a landowner is entitled so to deal with such water on his own land as to deprive his neighbour of it entirely, it follows that he is equally entitled to render the water unfit for use by pouring sewage into it.

The Plaintiff and the Defendant were owners of adjoining lands. Each of them had on his own land a deep well, going down through the *London* clay into the chalk below to a depth of 300 feet below the surface. The distance between the wells was ninety-nine yards. The Plaintiff's land was at a lower level than the Defendant's. The Defendant turned sewage from his house into his well, and thus, as the Plaintiff alleged, polluted the water in his well.

Held, that the Plaintiff had no legal cause of action.

Womersley v. *Church* (1) explained.

THIS action was brought to restrain the Defendants from polluting the water coming to a well belonging to the Plaintiff.

The Plaintiff was a brewer at *Brentford*, in *Middlesex*. He carried on his business on some premises known as the *Royal Brewery, Brentford*, of which he was the owner in fee. The business had been carried on there by him and his predecessors in title for many years. From the year 1849 until about two years before the commencement of the action, the water used by the Plaintiff and his predecessors for brewing was drawn from a deep well situate on the brewery premises. This well was sunk to a depth of about 222 feet into the *London* clay, and was bricked round. The *London* clay extended to a depth of about 250 feet below the surface. From the bottom of the bricked well an iron bore pipe was carried down through the remainder of the bed of *London* clay into the stratum of *Thanet* sand, which lay immediately below it, and through the sand into the chalk, which was the next stratum below, the lower end of the pipe being about 300 feet below the surface. Both the sand and the chalk were water-bearing strata, and water from those strata

(1) 17 L. T. (N.S.) 190.

found its way by natural pressure into the Plaintiff's well, the level at which the water stood in the well being on an average about twenty-seven feet below the surface of the ground. From the upper surface of this well the water used by the Plaintiff for brewing purposes was raised by pumping. The Plaintiff alleged that the water derived from this well was naturally extremely soft and pure, and was specially adapted to brewing purposes.

The Defendant *Tomlinson* was the owner in fee of premises near to those of the Plaintiff, and separated from them by a public highway. The Defendant's premises had been formerly occupied and used as a distillery, but the business of the distillery had been for some years discontinued, and a printing house had been erected on the land, which was occupied by the Defendant *Jackson*, who was a printer, as tenant to *Tomlinson*. On the Defendants' premises was also a deep well of a construction similar to that of the Plaintiff's well, going down in the same way and to about the same depth into the sand and the chalk. This well was situate at a distance of about ninety-nine yards from the Plaintiff's well. The level of the surface of the ground at the Defendants' well was about ten feet higher than at the Plaintiff's well, and the water in the Defendants' well stood on the average at a level of about thirty-seven feet below the surface. The Defendants' well had formerly been used for the purposes of the distillery, but in 1874, the distillery business having been then discontinued, the Defendant *Tomlinson* constructed a drain from a water closet attached to the printing house, by means of which the sewage of the water closet was discharged into the well.

The Plaintiff alleged that the two wells had a common source of supply, and that the sewage discharged into the Defendants' well had polluted the water supply of the Plaintiff's well, and that he had for a considerable time been unable to use the water for brewing purposes. This had caused the Plaintiff serious loss and damage, inasmuch as he had been compelled to obtain a supply of water for the purposes of his brewery from a water company, and the quality of the water supplied by them was inferior for brewing purposes to that of the water formerly obtained from the Plaintiff's well.

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The Plaintiff claimed an injunction to restrain the Defendants from permitting their well to be so used, and from so using the same, as to pollute the water in, or coming into the Plaintiff's well, and from allowing the Defendants' well to remain in such a condition as to pollute the water in, or coming into the Plaintiff's well. The Plaintiff also claimed damages for the injury caused to him by the pollution.

By their statement of defence the Defendants said: "If (which the Defendants deny) polluted water from the Defendants' land comes into the land of the Plaintiff, it comes there by the act of the Plaintiff, and not of the Defendants. The Plaintiff by his said well and pumping draws and abstracts the water containing such pollution (if any) from the land of the Defendants, and, but for such pumping and abstraction, no water or pollution would reach the Plaintiff's land from the land of the Defendants."

There was evidence which shewed that when water was pumped from the Plaintiff's well, so as to lower the depth of the water standing in the well, the depth of the water standing in the Defendants' well was also lowered, though not to so great an extent, and that, apart from any pumping, the water in the two wells would stand practically at the same level. On one occasion when the Plaintiff's pumps were kept going for forty-eight hours, the water in his well was lowered seventy-eight feet, and that in the Defendants' well was lowered fourteen feet. One witness said that the reason of this difference was that the ground all round was charged with water, but that, if the pumping was continued long enough, both wells would be reduced to the same level. One of the witnesses said, in cross-examination, that it was because the head of water in the Plaintiff's well was reduced artificially by pumping, that the water found its way from the Defendants' well into the Plaintiff's well. By way of experiment some chloride of lithium was put into the Defendants' well, and two or three days afterwards traces of lithium were found in the Plaintiff's well. The Plaintiff had meanwhile been pumping from his well for about forty-eight hours.

Professor *Frankland* gave evidence as to an analysis which he had made of water taken from the Plaintiff's well, and stated that in his opinion the water was polluted with sewage, and was

quite unfit for dietetic purposes. He said also that, in his opinion, without any pumping, the water in the Defendants' well must naturally find its way into the Plaintiff's well, but that of course pumping would enormously facilitate it. Mr. *Joseph Lucas*, an associate of the Surveyors' Institution, and who was for some years a consulting hydro-geologist, and had been for nine years employed on the Government Geological Survey, said that, in his opinion, if there were no pumping, anything which was put down the Defendants' well would not find its way to the Plaintiff's well.

Cookson, Q.C., *Webster*, Q.C., and *De Castro*, for the Plaintiff:—

It is no doubt settled law that there can be no property in water which runs through natural undefined channels underground: *Chasemore* v. *Richards* (1). But an owner of land has no right so to use his land or his well in such a way as to pollute the adjacent underground strata and thus prevent his neighbour from drawing pure water from them as he has been accustomed to do. A man who has sewage on his land is subject to a liability similar to that of a man who keeps a ferocious beast on his land; he must keep it from injuring his neighbour, "He whose dirt it is must keep it that it may not trespass": *Tenant* v. *Goldwin* (2). He must not allow the sewage to escape on to his neighbour's land. A man who constructs a reservoir for water on his land must not let it escape to the injury of his neighbour: *Rylands* v. *Fletcher* (3). The Defendants' well and the pipe at the bottom of it are artificial channels, and they are responsible for the consequences of allowing sewage to flow into them.

[PEARSON, J.:—If there are two owners of adjoining mines, the one who is first there may work up to his boundary, and his neighbour must keep the water out of his own mine.]

That is subject to the qualification that the first owner has carried on fair mining operations; my neighbour cannot complain of my working my mine fairly. But putting a cesspool on my land is not a fair use of it. If my neighbour was to put

(1) 7 H. L. C. 349. (2) 1 Salk. 360.
(3) Law Rep. 3 H. L. 330.

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arsenic into his well and the result was that it found its way into my well, and my children were poisoned by drinking the water, he would be indictable for manslaughter. Unappropriated water is *res communis*, just as air is; therefore, the Plaintiff has a right to get the underground water into his well.

[PEARSON, J.:—The Defendants are clearly entitled to pump every drop of water out of the chalk stratum and leave you with none. What difference does it make in principle if they deprive you of the water by rendering it unfit for use?]

I have a right to appropriate the water if it is there; if it is not there, I cannot complain. But my neighbour has no right to poison the water if he does not want to use it himself. My neighbour has no right to poison the air, and the same principle applies to water. If he digs his well deeper than mine, and so draw all the water away from mine, I cannot complain; that is *damnum absque injuriâ*. But he cannot put anything either into my well or into his own well, which will pollute the water in my well.

[Sir *F. Herschell*, S.G., for the Defendants:—The case made on the pleadings is, not that we send our sewage on to the Plaintiff's land, but that we pollute a source of supply which is common to both the wells. There could, therefore, be no pollution but for the Plaintiff's own pumping.]

In *Hodgkinson* v. *Ennor* (1), it was held that an action could be maintained for the pollution of water which flowed through underground channels into a natural basin on the Plaintiff's land. When the water is in my well the Defendants are not entitled to do anything to foul it.

[PEARSON, J.:—If you choose to make the water your property you must take it as you find it. It is said that, unless you pumped the water out of your well, the pollution from the Defendants' well would not come into yours.]

The pumping does not differ in principle from drawing up the water in a bucket; it is only a more expeditious mode of drawing

(1) 4 B. & S. 229.

it up. If I drew out a single bucket of water, the level of the water in my well would be lowered, and there would be some flow of water from the Defendants' well toward mine. In *West Cumberland Iron and Steel Co.* v. *Kenyon* (1) Mr. Justice *Fry* said (2), that a person who sinks a well or pit on his own land, "takes with it and incurs all the liability which attaches to that property."

In *Womersley* v. *Church* (3) it was held by Lord *Romilly*, M.R., that the owner of a cesspool could not use it in such a way as to pollute the water flowing through underground channels into his neighbour's well, which was supplied by water percolating through the earth. That case is very like the present.

[PEARSON, J.:—The well which was polluted there was a standing well, naturally fed.]

That makes no difference. Pumping is only a more rapid mode of drawing the water; in either case nature fills the vacuum caused by the abstraction of the water. In *Angell* on the Law of Watercourses (4), *Hodgkinson* v. *Ennor* (5) is referred to, and it is said that, "Cases in which the landowner, by positive acts, fouls, poisons, or corrupts the waters which percolate from his lands to those of his neighbour, have been supposed to be clearly distinguishable from those we have just been considering" (*i.e.*, such cases as *Chasemore* v. *Richards* (6) and *Acton* v. *Blundell* (7) "and to depend upon different principles." The Plaintiff can utilize the water in his well for practical purposes only by means of pumping. In *Dudden* v. *Guardians of Clutton Union* (8) it was held that an action would lie for cutting off at its source a spring from which water ran in a natural gully to a stream on which was a mill; and in *Whaley* v. *Laing* (9) it was held that, though there may be no right to water, there may be a right, if it comes or is sent, to have it come or sent without pollution. The judgment of *Tindal*, C.J., in *Acton* v. *Blundell* (10) is in our favour.

(1) 6 Ch. D. 773.
(2) Ibid. 781.
(3) 17 L. T. (N.S.) 190.
(4) 6th Ed. p. 183.
(5) 4 B. & S. 229.
(6) 7 H. L. C. 349.
(7) 12 M. & W. 324.
(8) 1 H. & N. 627.
(9) 2 H. & N. 476; 3 H. & N. 675, 901.
(10) 12 M. & W. 351.

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Sir *F. Herschell*, S.G., *Warmington*, Q.C., and *Vaughan Hawkins*, for the Defendants:—

The case which the Plaintiff makes by his pleadings is, not that I put filth on my land, and then send it on to his land, but that, each of us having a well on his own land, and the source of the supply of water being common to both wells, I, by what I put on my land, pollute the common water supply. If that be so, still it gives no legal cause of action. If the Plaintiff chooses to draw water from that common supply, he must take the water as he finds it. The pollution finds its way into his well as the natural result of his own pumping. I have a right to do what I choose with my own property. If I were to send pollution into a well defined stream, even if it flowed underground, the Plaintiff might have a right of action against me. But that is not the present case. The Plaintiff himself draws away the water from my land by means of his own pumping. The Plaintiff is bound to shew, not only that there is a state of things consistent with his having a cause of action; he must shew that he has a cause of action,—that there is something, the existence of which is inconsistent with his not having a cause of action.

The Plaintiff's case would be equally good if my well was ten miles away from his. I am doing on my own land that which I have a perfect right to do; there would be no injury to the Plaintiff but for that which he does himself. This distinguishes the case from *Rylands* v. *Fletcher* (1). The Plaintiff himself pulls the string which lets the wild beast out of his cage. But for the decisions in *Acton* v. *Blundell* (2) and *Chasemore* v. *Richards* (3) I should have a cause of action against the Plaintiff for drawing the water away from my well. If the water flowed in a defined channel I should have a cause of action against him; as it is, neither of us has any cause of action against the other for drawing off the water. The only case cited which is at all like the present case is *Womersley* v. *Church* (4). But there the sewage found its way into the plaintiff's well without any pumping

(1) Law Rep. 3 H, L. 330.
(2) 12 M. & W. 324.
(3) 7 H. L. C. 349.
(4) 17 L. T. (N.S.) 190.

on his part; he did nothing more than draw up the water by a bucket.

Cookson, in reply:—

The case which I raise is covered by the statement of claim. When it speaks of the wells having a common source of supply, all that is meant is that they are in communication. The water from the Defendants' well would reach mine without any pumping, though it would not come so quickly. The distance is immaterial, if it is proved that I am injured by what the Defendants do.

PEARSON, J.:—

This case is, no doubt, an important one to the parties, and I may say, perhaps, it is one of some difficulty as regards the point of law involved in it.

The case, really, as regards the facts, which are hardly in dispute, is a very simple one. [His Lordship stated the facts, and continued:]—The Plaintiff complains that, whereas, up to the year 1874, the water which came through the bore-pipe into his well was pure water, water which he could use advantageously for his brewery purposes, since the drain from the Defendant's privy has been connected with this well, and sewage has been allowed to be poured into it, he has found that his water is more or less contaminated with sewage, and he alleges that, having made inquiries and experiments for the purpose, he has traced that sewage to the Defendant's well. He says, therefore, that the Defendant is the cause of a wrong to him in contaminating the water standing in his well. For the purpose of taking the water out of his well for supplying his brewery the Plaintiff uses a pump, which goes so far only down into the standing water of the well as is necessary to enable the Plaintiff to raise the water; it does not pump the water directly from the chalk into the well. In one sense it may be said to pump the water from the chalk into the well, viz., that, as, by means of the pump, you take water out from the top of the well, you thereby diminish the pressure in the well, and the water rises from the chalk in order to fill up the vacuum so left.

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The answer of the Defendant is twofold. He says, in the first place, "On your own statement you have no cause of action against me." That raises a pure question of law. The Defendant says, in the second place, "If any injury is done to you, or happens to you, it is your own doing; so long as the wells are left in their normal condition they are at an equilibrum; there is no substantial or appreciable flow of water from the one to the other, and the consequence is, whatever I do in my well, if you leave me alone, it could not affect you at all; but, if you will pump the water out of your well, it necessarily follows that you produce, according to the power with which, and the time during which, you pump, a larger or smaller cone of exhaustion in the underlying chalk, and, as you increase the cone of exhaustion, you draw nearer and nearer to my well, and, eventually, by pumping long enough you draw away all the water from the chalk lying under my well, or at all events the greater portion of it, and, if you take it with what I have turned into it, you cannot complain, because it is entirely your own doing, and I am not to blame." I will consider first what the rights of the Plaintiff are with regard to the water lying in the chalk. It lies more than 300 feet below the surface of the land, and, in spite of Mr. *De Castro's* argument, I cannot accede to his view that all the water lying in the chalk basin around *London* must be considered as a large lake, upon which and with respect to which the owners of the surface have the rights of riparian owners. I am of opinion that under the circumstances I must consider this water to be as much unknown and invisible as was the water which was the subject of the litigation in *Acton* v. *Blundell* (1) and *Chasemore* v. *Richards* (2). That being so, I am bound to say that the Plaintiff has not and cannot have any right of property in this water. He has not even the right of usufruct in the sense in which a riparian owner has the usufruct of water which flows by his land, because it has been decided in the cases to which I have referred, that any person is entitled on his own land so to dig as to divert the whole of the streams which are percolating under ground, and thus to deprive his neighbour of every drop of water which he previously had. It follows, as a

(1) 12 W. & M. 324. (2) 7 H. L. C. 349.

matter of law, that the present Defendant would be perfectly entitled to dig down to the bottom of the bore-pipe, and, were it feasible, to divert all the water which at the present moment is underlying the Plaintiff's land, and to leave him without a single drop of water for the purposes of his brewery, or for any other purpose.

That being so, it is plain that, as regards quantity, a landowner cannot have as against his neighbour the same right to underground water which a riparian owner has; the right of the lower as against the upper riparian owner being a right to have the stream sent down to him in the same quantity and of the same quality as when it flows past the land of the upper proprietor.

If, then, the right to quantity is taken away, does the right to quality remain? The argument has been, that although the Defendant might abstract all the water, he is not entitled to alter the quality of the water in any respect. I am absolutely unable to follow that argument. If the Defendant is at liberty to take away all the water and deprive the Plaintiff of it entirely, I am at a loss to conceive how you can separate the right to quality from the right to quantity, and say that, whilst the Defendant may deprive the Plaintiff of the whole quantity, he must nevertheless leave the quality as he found it originally.

I come, therefore, to the conclusion that the Plaintiff has no greater right to the quality of the water than he has to the quantity. If I had to determine the exact point whether a proprietor of higher land under which, at the depth of 300 feet or more, there is found to be subterranean water, has a right to deal with that water as he pleases as regards its quality, without being liable to any action by a neighbouring proprietor of lower land, I think I should, without much hesitation, decide that question in the affirmative; for, the Courts having decided that the upper proprietor has the complete control over the quantity of the subterranean water in his land, I think it is impossible to distinguish between the control of quantity and of quality, and to say that while he has complete control as regards quantity, he has none as regards quality.

But the case is put very ingeniously by Mr. *Cookson* thus. He says: "I do not ask what you are doing upon your own land, but

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I complain of what you are doing upon my land. I have got, as you know, a bore pipe, which goes down into the chalk, and I find water there; and, finding water there, and having had for many years (although I do not rely upon any statutory right) pure water there, I now find that you substitute sewage for that pure water,—you allow your sewage to enter my land, or rather, you send your sewage into my well. You have no right whatever to injure the water which is in my well; you do injure it, and consequently I am entitled to complain." And Mr. *Cookson* relies on *Womersley* v. *Church* (1) as shewing that no man is entitled to create on his own land a nuisance of such a nature as to foul the water of his neighbour's well, or to allow sewage to percolate from his land into his neighbour's well. Upon reading that case carefully I have come to the conclusion that there the defendant was so dealing with his own land that the foul water percolated through it and through the sides of his neighbour's well, injuring the water in that well. I agree that a man cannot be allowed to do that. That was not a case of dealing with subterranean water. But, when you are dealing with water which is invisible, I must assume for all purposes, as the Courts did in the cases to which I have referred, that nobody knows what its course has been or what its course will be, and the plaintiff has to shew that an injury is done to some right of his. Now, if I am correct in coming to the conclusion that the person who gets the first control of the water is at liberty to use it for any purposes which he pleases, then I say that no legal injury is done to the Plaintiff. He takes his chance of what the water may be when it comes to him. He is entitled to the subterranean water as it reaches him, but he cannot complain if his neighbour has, before it reaches him, exercised his right in such a manner as either to deprive him of the water altogether, or entirely to alter its quality. I am of opinion, therefore, upon this point of law, that the Plaintiff has no right of action against the Defendants.

The other point in the case the *Solicitor-General* has put exceedingly clearly. He says: "It is in evidence that at this particular part of *Brentford* you are very nearly at the lowest level of the chalk stratum, and there is no evidence whatever that

(1) 17 L. T. (N.S.) 190.

if the two wells were left in perfect quiet anything would get from the Defendant's well into the Plaintiff's well. Both wells being in a state of equilibrium, whatever the Defendant poured down his well would remain there, and whatever water there might be under the Plaintiff's land would remain pure, and nothing would escape from the Defendant's well to the Plaintiff's well." "But," says the *Solicitor-General*, "if you choose to alter that state of things, if you choose, for your own purposes, and in order to make use of the water, to pump from your well, and thus to create a vacuum, the result is, that as the cone of exhaustion extends in the chalk stratum, you arrive at last at the Defendant's well, and you naturally draw away from him the water which is lying under his well. The Defendant does not complain of that, but he says, 'If you choose to come upon my land and draw away the water which is there, you must be content to take that water as you find it, and you cannot complain that it is dirty, when you yourself have come to seek it and have taken it away. I did not send it to you, I left it where it was; you yourself have, *ex mero motu*, chosen to come and draw off the water.' Now is not that true? Must it not be the case, where all this water is lying in the chalk stratum, that any one who draws it must draw it away from his neighbours? The water is not confined in an inexhaustible reservoir immediately underneath the Plaintiff's land, but it is lying in a very large stratum underneath, and, if you take any of it away, the place from which you take it must be immediately supplied by water coming, more or less, from a distance, and the longer you pump the greater the distance from which it will come. Is it not, therefore, one of the incidents of the use of this water that, if you choose to use it, you must take it subject to everything which has occurred to it by reason of the use of it by other landowners at a distance before it can reach your land?" I think that argument is sound, and, if so, there is a defence on that ground also to the action.

I desire to add this: The learned Judges who advised the House of Lords in *Chasemore* v. *Richards* (1) said this (2): "In the course of the argument one of your Lordships (Lord *Brougham*) adverted to the French artesian well at the *Abattoir*

(1) 7 H. L. C. 349. (2) 7 H. L. C. 371.

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de Grenelle, which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case, the water which finds its way into the defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rain-water as it fell into a pond; nor would he have a right to intercept its fall, before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground and flowed to the plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the River *Wandle*; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its way into the river and increasing its quantity, to the detriment of the plaintiff's mill. Such a right as that claimed by the plaintiff is so indefinite and unlimited, that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable." These observations appear to me to apply exactly to the present case. It is perfectly true that the Defendant's well is within 100 yards of the Plaintiff's; but, if the complaint is that the Defendant has no right to turn sewage into his well, because, when the Plaintiff comes to draw his water he may draw the sewage off from the Defendant's land and so contaminate his own water, the case must necessarily be the same in principle with regard to wells at a greater distance. The present Defendant would have a similar right to complain of any well a short distance from his; the owner of that well would have the like right to complain of a well a little distance beyond him, and so on, through the whole area or basin of sixty miles, you might have a series of litigants, each studiously regarding his own particular well, but, inasmuch as the water is drawn off by one well from another, whatever is under any one well will be ultimately brought down to the lowest level, and it would be quite possible, if there were a sufficient number of wells

extending over sixty miles, that whatever was under the well at the highest point should be ultimately brought down to the lowest well, and in that way the owner of the lowest well might have a right to complain of wells over a whole district, embracing, as Dr. *Frankland* told us the chalk basin in the present case does, from sixty to eighty miles of country. I cannot help seeing the great inconvenience which would arise if the Court were to come to such a conclusion as this.

I may add that, although at the present moment I am dealing only with the water in the stratum of chalk 300 feet below the surface, if at some future time the population of *England* should have greatly increased, and the water in that stratum should be exhausted, and a still deeper source of water supply be found, I can conceive no depth to which this Court might not be required to go, and say that no man should be able to use his own property as he pleased, even down to a depth of 1000 yards, without the fear of finding some neighbour saying, "By what you are doing you contaminate the underground water which is percolating at that depth, and I am therefore entitled to restrain you from so doing." I think the argument *ab inconvenienti* which was held to apply in *Acton* v. *Blundell* (1) and in *Chasemore* v. *Richards* (2), applies with as much or greater force to the present case. I must, therefore, dismiss this action with costs.

Solicitors for Plaintiff: *G. H. K. & G. A. Fisher.*

Solicitors for Defendants: *Wright & Pilley*, agents for *Ruston, Clark, & Ruston, Brentford.*

(1) 12 M. & W. 324. (2) 7 H. L. C. 349.

W. L. C.

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1884
Feb. 9, 16.

In re WARREN'S TRUSTS.

Settlement—Construction—"Issue"—Power of Appointment—Invalid Appointment by Will—Election.

There is no inflexible rule that, if the word "issue" is evidently used in one clause of a settlement as meaning "children" only, it must be construed in the same sense in every other clause.

A marriage settlement contained a power for the wife to appoint by will among the issue of the marriage, and, in default of appointment, the trust fund was to be in trust for the issue of the marriage, if more than one in equal shares, the son or sons at twenty-one, and the daughter or daughters at twenty-one or marriage; and, in case there should be but one child issue of the marriage, or, if more than one, all but one should die without having become entitled, then in trust for such only or surviving child; and in case there should not be any issue of the marriage, or all such issue should die without having become entitled, then upon other trusts:—

Held, that the word "issue" in the power of appointment must be construed in its strict technical sense, and that an appointment by the wife to the children of a deceased son was valid.

The wife appointed another part of the fund on trust for another living son for his life, with remainder to his child or children who should attain twenty-one, if more than one in equal shares. The testatrix also bequeathed property of her own to the persons who were entitled in default of appointment. It was admitted that the appointment to the children of the living son was void for remoteness:

Held, that, the appointment being *ex facie* void, the will must be read as if the appointment had not been contained in it, and that the persons entitled in default of appointment were not bound to elect between the interest which they took in that way, and the benefits given to them by the testatrix out of her own property.

THIS was a petition under the *Trustee Relief Act*.

By a settlement dated the 3rd of March, 1829, made in contemplation of the marriage of *Samuel Robinson Warren* and *Emily Thomasine Elgee*, in consideration of the then intended marriage *Warren* assigned to two trustees a sum of £600 government stock, and two annuities charged on some leasehold property, and all interest, dividends, and annual sums then due or which should thereafter become due and payable thereon, upon trust that the trustees should, from and immediately after the solemnization of the intended marriage, permit *Warren* during his life, or until he should become a bankrupt or insolvent, or fail in his credit,

whichever of such events should first happen, to receive and take all such interest, dividends, and annual sums which were then due, or which should or might from time to time thereafter become due or payable during the life of *Warren*, or until he should become bankrupt or insolvent, or fail in his credit, whichever of such events should first happen, to his own proper use and behoof; and from and after the decease of *Warren*, or in case he should become bankrupt or insolvent, or fail in his credit, whichever of such events should first happen, then and from thenceforth to permit the intended wife to receive and take all such sum and sums of money which should from time to time accrue or become due and payable for interest or dividends upon the £600 stock, or for or in respect of the annuities to and for her own sole and separate use and benefit during her life, and not to be subject to the debts, control, or interference of her intended husband *Warren*, or of any other husband if she should marry after the death of *Warren;* and in case *Warren* should survive his said intended wife, and should become bankrupt or insolvent, or fail in his credit, after her death, leaving issue of the intended marriage, then and from thenceforth upon trust that the trustees should and might receive all such interest and dividends in trust for the use and benefit of such issue, and for their maintenance and education during the life of *Warren*, in such shares and proportions as might be fit and proper; and, from and after the decease of both *Warren* and his intended wife, then in trust for the issue of the intended marriage, if more than one in such shares and proportions, and to be paid to them at such time and times, as *Warren* should by deed or will appoint, and for want of such appointment by *Warren*, then in such shares and proportions as the intended wife should by deed or will appoint; and for want of such appointment by *Warren* or his wife or either of them, then upon trust as to the principal sum of £600 stock, and the interest and dividends thereof, and the annual amount and proceeds of the annuities, for the use and benefit of the issue of the intended marriage, if more than one in equal shares and proportions, the son or sons to be entitled to his or their share or shares on attaining the age of twenty-one years, and the daughter or daughters on attaining their respective ages of twenty-one years

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or day or days of marriage, whichever should first happen, and in case any of such issue should die without having become entitled to his, her, or their share or shares, the share or shares of him, her, or them so dying was to go to and among the survivor or survivors of them, together with his, her, or their share or shares; and in case there should be but one child issue of the intended marriage, or, if more than one, and all but one should die without having become entitled, then in trust for the use of such only or surviving child at the time thereinbefore limited or appointed; and in case there should not be any issue of the intended marriage, or all such issue should die without having become entitled to their respective shares as aforesaid, and the intended wife should also die in the lifetime of *Warren*, then upon trust for *Warren* absolutely; and in case the intended wife should survive *Warren*, and should die without issue living of the intended marriage, or in the event of such issue dying without receiving their respective shares as aforesaid, then upon trust for the proper use and behoof of the executors, administrators, or assigns, or of the next-of-kin of *Warren*, or of such person or persons as would be by law entitled thereto if *Warren* died without ever having been married. The deed contained a covenant by *Warren* (who was an officer in the army), that, in case he should at any time thereafter during the life of the intended wife, sell his commission, then it should be lawful for the trustees to receive from the purchaser of the commission the sum of £1000, but upon the trusts previously declared of the £600 stock. The deed also contained a mutual covenant and agreement between the parties that any property to which the intended wife might thereafter become entitled in her own right should be deemed and taken to be the sole and exclusive property of the intended wife, and should not be subject to the debts or engagements of her then intended husband, nor of any future or other husband whom she might marry, but that the same should become vested in the trustees for the use and benefit of the intended wife and of her children (if any), in such manner and at such times as she should by deed or will, notwithstanding coverture, direct or appoint. And it was also mutually agreed that in case the intended wife should become entitled to any such property in

her own right, and should not have any child or children of the intended marriage, or of any after marriage, amongst whom to dispose of the same, then and in such case it should be lawful for her to dispose of the same as she might think proper, notwithstanding coverture, by deed or will: Provided always, and it was mutually agreed that, notwithstanding anything therein contained to the contrary, *Warren* should be entitled during his life, or until he should fail in his circumstances, or become bankrupt or insolvent, to receive to his own use the income which might arise from such the separate or exclusive property of the intended wife, but from and after the death, insolvency, or bankruptcy of *Warren*, whichever should first happen, the same was to be paid and applied to the use of the intended wife and her issue, if any, and for want of issue to such persons as she might appoint as thereinbefore provided and agreed upon, and in such manner and upon such terms and under such limitations and restrictions as thereinbefore mentioned.

S. R. Warren died on the 8th of September, 1857, without having exercised the power of appointment conferred on him by the settlement. There were issue of the marriage four children only, viz., *Emily Warren*, *Lionel Smith Warren*, *Charles Warren*, and *William Andros Warren*, all of whom attained twenty-one. *Charles Warren* was adjudicated a bankrupt on the 20th of July, 1871. The bankruptcy was closed on the 2nd of July, 1878, but at the time when this petition was presented the bankrupt had not obtained his discharge. *W. A. Warren* died on the 11th of December, 1880, having by his will, dated the 25th of July, 1877, appointed his wife sole executrix thereof, and sole guardian of his infant children. *Emily Thomsaine Warren* made her will, dated the 19th of April, 1881, and thereby, after reciting the power of appointment contained in the settlement, she in pursuance and execution thereof appointed that the trustees should forthwith, or as soon as conveniently might be after her decease, pay and transfer the sum of £1097 10*s.* 2*d.*, stock, part of the settled property, to her daughter *Emily Warren*, for her own benefit absolutely, and further that the trustees should forthwith, or as soon as conveniently might be after her decease, pay or transfer the sum of £50 (or so much of the sum of £658 13*s.* 7*d.*,

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stock, further part of the settled property, as should be of that value) to her son *Charles Warren*, for his own benefit absolutely; and further that, subject thereto, the trustees should pay to her son *L. S. Warren* for his life the income arising from the sums of £589 17*s.* 3*d.* and £393 5*s.* 8*d.* stock, part of the settled property, and upon the death of her said son the testatrix directed that the said two capital sums should be assigned, transferred, and conveyed to his child or children who should attain twenty-one, and if more than one in equal shares; and that the trustees should pay or transfer the sum of £1000 Consols (further part of the settled property), and the residue of the said sum of £658 13*s.* 7*d.*, stock (after paying thereout £50 to her son *Charles*), and the income therefrom, unto the five children of her late son, *W. A. Warren*, viz., *W. L. Warren*, *L. C. Warren*, *Ethel Warren*, *Louisa Warren*, and *Winifred Warren*, on their attaining twenty-one, in equal shares; and further that the trustees should assign or convey to her son *L. S. Warren* all her settled share in certain real and leasehold estate for his own benefit absolutely. The testatrix then made dispositions of property belonging to herself and not subject to the settlement, in favour of her daughter *Emily*, her son *Charles*, her grandchildren, the five children of her late son *W. A. Warren* (to whom she gave £2000, in addition to the benefit and bequest appointed to them as aforesaid, in equal shares), and her son *L. S. Warren*. And she directed that, in the event of either of her said grandchildren dying before attaining twenty-one as aforesaid, the share of the child so dying of and in her settled property so appointed as aforesaid, as well as the share of her said residuary estate, should be equally divided between the survivors of them. The testatrix died on the 9th of November, 1881. The five children of *W. A. Warren* named in her will survived her, and they were when this petition was presented all under twenty-one. When the petition was presented *L. S. Warren* had had issue two children only, viz., *L. E. Warren* and *W. R. Warren*, both of whom were living and under twenty-one. The trustees, after paying the £50 appointed to *Charles Warren*, transferred the residue of the stocks subject to the trusts of the settlement into Court. The petition was presented by the five infant children of *W. A. Warren*, deceased, by their

next friend, and the two infant children of *L. S. Warren*, by their next friend, asking that, subject to the payment of costs, one-fifth part of the sums of stock appointed by the testatrix to the five children of *W. A. Warren* might be carried over to separate accounts in the names of those children respectively, contingently on their respectively attaining twenty-one, and that the dividends on the sums of stock appointed in favour of *L. S. Warren* and his children might be paid to *L. S. Warren* until further order, and that it might be declared that the appointment in favour of his children was a valid exercise of the power of appointment. The question was raised whether the appointments made by the testatrix to the children of her son *W. A. Warren*, and to her son *L. S. Warren* for his life, with remainder to his children, were valid appointments under the power. And there was the further question whether, if the appointments were not valid, the persons entitled in default of appointment were bound to elect between the interests which they respectively took in default of appointment under the settlement, and the benefits which they respectively took under the will in the testatrix's own property.

Everitt, Q.C., and *Bridgeman*, for the Petitioners:—

The power of appointment is not confined to children, but it extends to issue of the marriage generally. The fact that the words of the limitation in default of appointment shew that the word "issue" is there used in the sense of "children" is not a sufficient reason for thus restricting the meaning of the word in the power. There is no inconsistency in the word having different meanings in the power and in the trust in default of appointment. In a will the word "issue" may be differently construed in different clauses: *Hedges* v. *Harpur* (1); *Carter* v. *Bentall* (2). The same principle applies to a settlement. A general power of appointment among issue is perfectly good, if it is exercised within the legal limit as to time, so as not to violate the rule against perpetuity; but a limitation to issue generally in default of appointment would be invalid. The limitations of the wife's property do not assist the construction; they extend to issue of

(1) 9 Beav. 479. (2) 2 Beav. 551.

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a future marriage. "Issue" is, no doubt, a term of flexible meaning; it may be restricted to children if it appears that it was intended to be used in that sense only, but its proper meaning is "descendants": *Morgan* v. *Thomas* (1). As a general rule the meaning will not be cut down in a deed: *Harrison* v. *Symons* (2). Even in a will the Court will not readily restrict the meaning: *Dalzell* v. *Welch* (3); and it will even, to effectuate the intention, construe "children" as "issue": *Harley* v. *Mitford* (4).

Upjohn, for *Emily Warren*, *Lionel Smith Warren*, and the executrix of *W. A. Warren*:—

"Issue" means children, and the appointment to grandchildren is bad. *Primâ facie* the same word has the same meaning throughout the same instrument: *Ridgeway* v. *Munkittrick* (5); *Ross* v. *Ross* (6); *Rhodes* v. *Rhodes* (7). *Carter* v. *Bentall* (8) is distinguishable. In *Harrison* v. *Symons* there was no context, as there is here, shewing that the meaning of "issue" was to be restricted. *Morgan* v. *Thomas* was the case of a will, and the testator had clearly shewn that by "issue" he meant children. In a marriage settlement the natural meaning of "issue" is "children": *Thompson* v. *Simpson* (9). Under the trust in default of appointment only children could take: *North* v. *Martin* (10).

E. Cutler, for the trustee in bankruptcy of *Charles Warren*.

Everitt, in reply:—

Morgan v. *Thomas* is in my favour. In *Harrison* v. *Symons* Vice-Chancellor *Wood* said that "the only case for restricting the word 'issue' to children in a deed was that of *Swift* v. *Swift* (11). There it was almost impossible to construe it otherwise; and the marriage articles were executory, which brought the case nearly to that of a will": *Jarman* on Wills. (12)

(1) 9 Q. B. D. 643.
(2) 14 W. R. 959.
(3) 2 Sim. 319.
(4) 21 Beav. 280.
(5) 1 D. & War. 84.
(6) 20 Beav. 645.
(7) 27 Beav. 413.
(8) 2 Beav. 551.
(9) 1 D. & War. 459.
(10) 6 Sim. 266.
(11) 8 Sim. 168.
(12) 4th Ed. vol. ii. p. 443.

Upjohn referred to *Williams* v. *Jekyl* (1), *Campbell* v. *Sandys* (2), *Taggart* v. *Taggart* (3).

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PEARSON, J.:—

The question is as to the meaning of the word "issue" in the power of appointment, *i.e.*, whether the husband or the wife had a power of appointment to the issue of the marriage generally, or only a power of appointing to the children of the marriage; in other words, whether the power is to be confined to the children of the marriage. Stopping at the power of appointment, and remembering that the instrument is a deed—not articles for a settlement, but the settlement itself—I think no one could have any doubt that, in accordance with the ordinary rule of law, the word "issue" must be construed in its largest sense. To read it in that sense would lead to no inconsistency, and would be in no way contrary to the ordinary form of a marriage settlement. According to my experience, nothing is more common in a marriage settlement than a power enabling the husband and wife to appoint to issue of the marriage remoter than children, if born within the proper limit of time. And such a power is valid, even if this limit of time is not expressed in it, provided that the exercise of it is confined within the proper limit. Having come to the conclusion that there would be nothing irrational in so construing the word "issue" in the power, and that this construction is in accordance with the intention of the parties, I must hold that, stopping at the power, the word "issue" means "issue" generally. The settlement is very badly drawn, and there can be no doubt that the limitations over in the event of the husband's bankruptcy are invalid. But for the purpose of ascertaining the meaning of the word "issue," I must treat those limitations as if they were valid. Among them there is a direction to the trustees to apply the income of the trust funds, after the death of the wife leaving issue of the marriage, for the maintenance and education of such issue during the life of the husband. It might very well happen that in that event there might be no issue but grandchildren or great grandchildren living, and in such

(1) 2 Ves. Sen. 681. (2) 1 Sch. & Lef. 281.
(3) 1 Sch. & Lef. 84.

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a case this direction would be inoperative if "issue" did not include grandchildren and great grandchildren. Looking at the intention of the parties, and considering the reasonableness of such a construction, I should, if I were to stop at the power of appointment, come to the conclusion that the word "issue" ought to be construed in its widest and strictly technical meaning. But it is said that in the subsequent provisions of the settlement there are expressions used which shew that the word "issue" is intended there to be restricted to children, and that, therefore, I ought to construe it in the same way in the earlier clause. I cannot see any necessity for so doing. It may well be that it was intended that only children of the marriage should take under the trust in default of appointment, but that a wider discretion should be given to the husband and wife by the power of appointment. I cannot see any *à priori* necessity for restricting the meaning of the word "issue" in the power of appointment, merely because that word can only mean "children" in the trust in default of appointment. It is almost impossible to put a sensible construction on some of the clauses of the trust in default of appointment, and I am glad that I am not called on to do so. Reference has been made to the clauses which provide for the settlement of future property of the wife. But I think it would be impossible to draw any analogy from the use of the word "issue" in those clauses, because in them the issue of the wife by the intended or any other marriage is referred to. This instrument being, as I have already said a deed—not merely articles for a settlement—I can see no reason why I should construe the word "issue" in the power of appointment as meaning only children of the marriage. By construing it to mean descendants generally I do not think that I am adopting two inconsistent interpretations; on the contrary, I think the result is to make the settlement as a whole a rational one.

Am I then bound by authority to construe the word "issue" in the former clause as meaning "children" only, merely because I find that it is expressly restricted to children in the latter clause? I think I am not. I think I am bound to look at the whole of the deed, and if I find that it was not intended to restrict the meaning of the word in the earlier clause, I must give the word

in that clause its proper unrestricted meaning. I am not bound to restrict the meaning unless there would otherwise be a manifest inconsistency, or I should be defeating the plain intention of the parties.

There are two classes of cases on the construction of the word "issue," those which relate to settlements and those which relate to wills. The Court has often laid it down that marriage articles are to be treated only as a memorandum of instructions, which are to be carried out in such a way as to effect the intention of the parties. But the Court never deals in that way with an executed settlement; it always takes such an instrument as it finds it. With regard to wills the Court always looks at the intention of the testator, and adopts in practice, if not in theory, a much more benignant rule of construction. In *Dalzell* v. *Welch* (1), which was the case of a will, the testator had given to his daughter, "in case she should leave any issue living at her death," a power of appointment with regard to some of his property, "among such child or children." In a subsequent part of the will he gave to his son, with regard to other property, a power of appointment "amongst the issue of his body." At the death of the son he had both children, grandchildren, and great grandchildren living, and it was held that an appointment by his will among his children only was invalid. This was a case which tried the rule very considerably, for there was a strong indication in the gift to the daughter that the word "issue" was at any rate not intended to be used in its strict sense throughout the will. In *Wyth* v. *Blackman* (2) there was a voluntary settlement of real estate to the settlor for life, remainder to his nephew *John* for life; remainder to his sons successively in tail male; remainder to four persons (three of whom were the testator's sisters, and the fourth was his niece), and their heirs, on trust that they or the survivor, or heir of such survivor, should sell the premises; and that the money raised thereby might be equally divided between the four persons, or the respective issues of their bodies, in case they, or any of them, should be dead at the time of such failure of issue male of *John*, share and share alike, viz., to each of them, or their respective children, one fourth part thereof;

(1) 2 Sim. 319. (2) 1 Ves. Sen. 196.

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provided that if any of them should be dead without issue, when there should be such a failure of issue of *John*, then to be equally divided among the survivors or their respective children, in case any of them also should be dead, leaving issue of their bodies. *John* died without issue. At the time of his death none of the four persons named in the will were living. The niece had died without issue. Of one of the sisters there were children living; of another, children and great grandchildren; of the third, only grandchildren. The contention was that the use of the word "children" restricted the meaning of the word "issue." But Lord *Hardwicke* came to the conclusion that, having regard to the fact that the testator must have contemplated that the ultimate trust might take effect after a long lapse of years, when it was more probable that grandchildren and great grandchildren would be living than children, the word "issue" must be construed strictly as including the grandchildren and great grandchildren. Again, in *Harrison* v. *Symons* (1) Vice-Chancellor *Wood*, said that "this being a deed, he did not feel justified in cutting down the word 'issue.'"

In the present case I am of opinion that the most rational conclusion is that the power of appointment was intended to enable the husband and wife to provide (if necessary) for their grandchildren or great grandchildren, it being quite possible that, when the power came to be exercised, there might not be any children of the marriage living, while there might be grandchildren or great grandchildren living, or that some of the children might have died leaving grandchildren or great grandchildren. I may add that in *In re Hopkins' Trusts* (2), which was a case of a will, Vice-Chancellor *Hall* said that he must decline to speculate as to probable intentions; "I cannot guess, but must do my best to construe the instrument upon the words themselves," and in that case he said, "taking, therefore, the words as I find them, the true interpretation is that the word 'issue' was used by the testator in the sense of 'children.' He has, I consider, thus explained himself." I hold that the appointment to the children of *W. A. Warren* is valid. The appointment to *Lionel Smith Warren* and his children is valid to the extent of

(1) 14 W. R. 959.

(2) 9 Ch. D. 131, 136.

his life interest, but is too remote as regards the interests given to his children.

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Everitt, for the children of *Lionel Smith Warren* :—

The question now arises whether the persons who are entitled to take in default of appointment are bound to elect between their interests in default of appointment and the bequests made to them by the testatrix out of her own property. A case of election arises as to the latter property: *Pickersgill* v. *Rodger* (1).

In *Wollaston* v. *King* (2) Vice-Chancellor *James* said (3): "It is also material that the reason why the gift fails is, that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise." There is no direct authority on the point except this *dictum*.

Upjohn, for the persons entitled in default of appointment.

PEARSON, J. :—

How can there be any question of election? I must read the will as if the invalid appointment were not in it at all. The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not *ex facie* void. In the present case it is the law which disappoints the appointee. The gift is void *ex facie*.

Solicitors : *Gosling, Ingleby, & Boak ; W. W. Aldridge.*

(1) 5 Ch. D. 163. (2) Law Rep. 8 Eq. 165.
(3) Law Rep. 8 Eq. 175.

W. L. C.

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1884

Feb. 25.

RIDDELL *v.* ERRINGTON.

[1880 R. 483.]

Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 50—*Petition for Confirmation of Contract for Sale—Consent of Married Woman—Examination—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 2.

Notwithstanding the provision of s. 50 of the *Settled Estates Act*, 1877, that, when a married woman consents to an application to the Court under the Act, she is to be examined apart from her husband as to her consent, such an examination is not now necessary in the case of a woman who has married since the commencement of the *Married Women's Property Act*, 1882.

THIS was a petition (presented in 1883), under the *Settled Estates Act*, 1877, for the confirmation by the Court of some provisional contracts which had been entered into on behalf of an infant for the sale of portions of a settled estate. The mother of the infant was entitled to a jointure, which was charged on the estate. At the time of the presentation of the petition she was a widow, but before it came on to be heard she had married again. At the hearing counsel appeared for her and consented to the prayer. Upon the drawing-up of the order the Registrar raised the question whether, under sect. 50 of the *Settled Estates Act*, 1877, she ought not to be examined as to her consent. The point was now mentioned to the Court.

Rawlinson, for the Petitioner:—

The examination is not now necessary, for the effect of sects. 1 and 2 of the *Married Women's Property Act*, 1882, is to put a woman who has married since the commencement of the Act in the position of a *feme sole* with respect to property which belongs to her at the time of her marriage.

PEARSON, J.:—

I think the examination is not now necessary.

Solicitors: *Flux & Leadbitter.*

W. L. C.

In re CAPE BRETON COMPANY.

PEARSON, J.

1884
Feb. 21, 25, 26.

Principal and Agent—Agent for Purchase—Sale of Agent's own Property to Principal—Non-disclosure—Rescission of Contract—Account of Profit made by Agent — Company—Winding-up—Director—Misfeasance — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165 [*Revised Ed. Statutes, vol. xiv., p.* 238].

If an agent employed by a principal to purchase property for him sells to the principal property of his own, which he acquired before the agency existed, concealing from the principal the fact that it is his own property, the principal has a right, on discovering the real facts, to rescind the contract. But, if he declines to rescind, or if, by reason of intermediate dealings with the property, rescission has become impossible, the principal is not entitled to call on the agent to account for the profit which he has made by the sale, *i.e.* either the difference between the price which he himself gave for the property and the price which he obtained from the principal, or the difference between the latter price and the market value of the property at the time of the sale to the principal.

In 1871 certain coal areas were purchased by a partnership, consisting of six persons, for £5500. In 1873 a company was formed, of which two of the partners were directors, and the property was sold to the company for £42,000, of which £12,000 was paid in cash and the remainder in fully paid-up shares of the company, the nominal vendor being one of the six persons, who was not a director of the company, and who was really acting as a trustee for the six persons. It was admitted that when the six persons purchased the property none of them stood in any fiduciary relation to the company. In 1875 the company was ordered to be wound up, and in 1880 the liquidator sold the property. In 1882 a creditor and contributory of the company took out a summons, claiming to make one of the directors, who was also one of the six partners, liable, under sect. 165 of the *Companies Act*, 1862, for a misfeasance by reason of the sale of the property to the company.

Held, that, the rescission of the contract having become impossible, no relief could be given against the director.

In re Ambrose Lake Tin and Copper Mining Company (1) and *Erlanger* v. *New Sombrero Phosphate Company* (2) discussed.

THIS was a summons, under sect. 165 of the *Companies Act*, 1862, taken out in the winding-up of the *Cape Breton Company*, seeking to make *Thomas Fenn*, a former director of the company, liable for an alleged misfeasance or breach of trust.

The company was registered under the *Companies Act*, 1862, on

(1) 14 Ch. D. 390. (2) 3 App. Cas. 1218.

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the 20th of November, 1873, for the purpose of acquiring the property and undertakings of three previously existing companies, called the *Lorway Coal Company*, the *Glasgow and Cape Breton Coal and Railway Company*, and the *Schooner Pond Coal Company* (all of which companies had acquired property in *Nova Scotia*), and certain other coal areas in *Nova Scotia*, called the *Haven, Lake*, and *Balmoral* areas. *Fenn* and *T. P. Baker* were two of the first directors of the *Cape Breton Company*, and were promoters of the company. On the 5th of December, 1873, two contracts were entered into in the name of the company with *F. W. Gisborne* for the sale by him to the company of the *Haven, Lake*, and *Balmoral* coal areas for the sum of £42,000, of which £12,000 was to be paid in cash and £30,000 in fully paid-up shares of the company, of the nominal value of £10 each. This agreement was carried out. In July, 1875, an order was made to wind up the company, and in 1880 the liquidator sold all the property of the company, including the three coal areas, for £14,500. This summons was taken out on the 6th of December, 1882, by the Right Honourable *George A. F. Cavendish Bentinck*, who was a creditor and a contributory of the company. The case alleged by him, and supported by evidence filed on his behalf, was as follows:—The three coal areas were in April, 1871, purchased by an association or partnership, called the *Coal Area Association*, consisting of six persons, viz., *Fenn, Herbert Crossthwaite, E. F. Satterthwaite, T. E. Twycross, Baker*, and *Gisborne. Fenn & Crossthwaite* carried on business in partnership as stockbrokers; *Satterthwaite & Twycross* carried on business in partnership as stockbrokers; *Baker & Gisborne* carried on business in partnership as engineers. The price paid by this association for the three areas amounted to about £5500. *Gisborne*, in selling and conveying the three coal areas to the *Cape Breton Company*, acted as a trustee on behalf of the members of the *Coal Area Association*, the legal estate in the property having been vested in him as a trustee for them. *Fenn* was a director of the *Cape Breton Company* at the time when the agreements of the 5th of December, 1873, were entered into on behalf of that company, and was present at a meeting of the board on the 17th of December, 1873, at which the seal of the company was affixed to the agreements, but he

did not disclose to the company, or to those of his co-directors who were not members of the *Coal Area Association*, the fact that he had an interest in the property which the company thereby agreed to purchase. Of the sum of £12,000 which was paid by the company in pursuance of those agreements, the sum of £4525 was retained by *Fenn* for himself and his partner *Crossthwaite*, and of the 3000 shares, 810 were transferred to nominees of *Fenn & Crossthwaite*, 1080 to nominees of *Gisborne & Baker*, 810 to nominees of *Satterthwaite & Twycross*. At the time when this was done the shares were saleable at the price of £6 13*s.* 4*d.* per share.

The summons asked a declaration that *Fenn*, as a director of the company, was guilty of a misfeasance or breach of trust in relation to the company in affixing the seal of the company, or allowing it to be affixed, to the agreements of the 5th of December, 1873, and in paying, or allowing to be paid and allotted, the £12,000 cash and the 3000 shares under those agreements, and that *Fenn* had misapplied and had become accountable to the company for the cash and shares, and that he might be ordered to pay to the liquidator the sum of £42,000, being the amount of the loss occasioned to the company by the misfeasance or breach of trust, or that he might be ordered to contribute such sum of money by way of compensation in respect of his misfeasance or breach of trust as the Court should think just.

Higgins, Q.C., *Cookson*, Q.C., and *Northmore Lawrence*, for the summons:—

This claim is in respect of a breach of trust, and the *Statute of Limitations* cannot be set up: *Flitcroft's Case* (1); *Lindsay Petroleum Company* v. *Hurd* (2); *Metropolitan Bank* v. *Heiron* (3). A contributory has the same rights as the liquidator. Mr. *Fenn* was a promoter of the company and a director, and as such he stood in a fiduciary position to the company, and was bound to disclose to them the fact that he had an interest in the property which he, as their agent, bought for them. The company, on discovering that he had an interest, would, no doubt, have been entitled to rescind the contract for purchase. It is true

(1) 21 Ch. D. 519. (2) Law Rep. 5 P. C. 221.
(3) 5 Ex. D. 319.

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that that is now impossible, because the property has been sold by the liquidator, and cannot therefore be restored to the vendors; but Mr. *Fenn* is still liable to account to the company for the profit made by himself and his partners by the sale, *i.e.*, either the difference between the price which they originally gave for it and the price at which they sold it to the company, or at any rate the difference between the price at which they sold it to the company and its real market value at that time. And, if the shares which were allotted in part payment of the purchase-money are not to be taken at their full nominal value, they must be taken at the value at which they were then saleable. The relief which we ask is not inconsistent with the authorities: *In re National Funds Assurance Company* (1); *Emma Silver Mining Company* v. *Grant* (2); *In re Anglo-French Co-operative Society* (3).

[PEARSON, J.:—If a man sells his own property to you, on what possible principle of law or equity can you make him account for the profit which he has made by the sale upon his previous purchase of the property, unless you can shew that he was your agent at the time when he made the purchase? You may be able to rescind the contract, if he was your agent at the time when the sale was made to you and he concealed the fact that the property was his own; but, if you do not, or cannot, rescind the contract, what right have you to keep the property, and make him repay you the excess of the purchase-money above the sum which he gave for the property?]

Mr. *Fenn's* duty as agent was to make the purchase on the best terms possible for the company. As against his principals he is not entitled to derive any benefit out of the transaction, and if he has done so he must refund it. He is accountable, not only for the profit which he himself made, but for that which he, as a director, allowed his co-owners to make. And the *onus* is on him to shew that a full disclosure of his interest was made to his *cestuis que trustent*, and that they were fully protected by an independent board of directors. It is sufficient that he was a director

(1) 10 Ch. D. 118. (2) 11 Ch. D. 918; 17 Ch. D. 122.
(3) 21 Ch. D. 492.

when the purchase was made by the company: *Erlanger* v. *New Sombrero Phosphate Company* (1); *Phosphate Sewage Company* v. *Hartmont* (2). If an agent buys secretly from his principal, the transaction will be set aside at the option of the principal: *Murphy* v. *O'Shea* (3); *McPherson* v. *Watt* (4). The principal might not discover the fact till after the lapse of many years, and *restitutio in integrum* might then have been impossible, but surely the agent could not be allowed to escape, and the only remedy would be to make him account for the profit which he had made. Under sect. 165 the Court has power to examine into the conduct of a director and to compel him to contribute to the assets of the company by way of compensation for a misfeasance or breach of trust. If he has been guilty of a misfeasance or breach of trust, he will not be allowed to escape from making compensation merely because the rescission of a contract has become impossible. That might be so by reason of an act of his own.

But, independently of sect. 165, the general doctrine of the Court shews that the company are entitled to affirm the contract, and still to make the agent who had an interest account for the profit which he has derived: *Dunne* v. *English* (5); *Bagnall* v. *Carlton* (6); *Lewis* v. *Hillman* (7); *Tyrrell* v. *Bank of London* (8); *Imperial Mercantile Credit Association* v. *Coleman* (9). Each director who is a party to a payment in breach of trust is liable for the whole sum paid away, even though he only receives a part of it himself: *In re London and Provincial Starch Company* (10); *Flitcroft's Case* (11). The approval of a contract such as this, which was an act relating to the constitution of the company, not mere ordinary business of the company, required the presence of the full body of the directors: *Kirk* v. *Bell* (12).

The relief which we claim is not inconsistent with the fair construction of what was said by Lord *Cairns* in *Erlanger* v. *New Sombrero Phosphate Company* (13). Suppose an owner of land

(1) 5 Ch. D. 73; 3 App. Cas 1218.
(2) 5 Ch. D. 394.
(3) 2 J. & Lat. 422.
(4) 3 App. Cas. 254.
(5) Law Rep. 18 Eq. 524.
(6) 6 Ch. D. 371.
(7) 3 H. L. C. 607.
(8) 10 H. L. C. 26.
(9) Law Rep. 6 H. L. 189.
(10) 20 L. T. (N.S.) 390.
(11) 21 Ch. D. 519.
(12) 16 Q. B. 290.
(13) 3 App. Cas. 1218.

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becomes a promoter of a company and sells to them for £100,000 land which he bought for £20,000, and then he and his associates, acting as directors of the company, sell the land to another company. This would make the rescission of the original contract impossible, but would it be consistent with natural justice that the first company should have no remedy against the promoters and directors? No doubt there are observations of Lord Justice *Cotton* in *In re Ambrose Lake Tin and Copper Mining Company* (1), which are adverse to our contention, but in the same case Lord Justice *James* said (2): "Now what we have got here to consider is a sale in substance made by the vendors for themselves, as beneficially interested, to themselves as directors of the company, being in that sense in a fiduciary character towards the company, and the sale is a sale by themselves in the one character to themselves in the other character. Of course such a sale is a thing that cannot stand, if it is questioned in time, and proper offers made to restore the thing purchased. And, if there is any difficulty in the way of restoration, if it is made out that they had received something beyond the proper price of the property, there ought to be no difficulty in making them pay that extra value. Suppose the property had been sold before the fraud was discovered, or suppose the *cestuis que trust* laid out a great deal of money in improvements, then the only mode of setting it right would be to make the vendors give the extra price which was paid for it." We are asking for the extra price paid by the company for the coal areas above their value. The principle of the decisions which lay it down that, when an agent has sold his own property to the principal, without disclosing that it is his own, the principal is, when he discovers the fact, entitled to rescind the contract, goes also to shew that, if the rescission of the contract has become impossible, the agent must account to the principal for the profit which he has derived from the transaction: *Rothschild* v. *Brookman* (3); *Gillett* v. *Peppercorne* (4); *Robinson* v. *Mollett* (5). The principle is, that it is the agent's duty to disclose his interest; the non-disclosure

(1) 14 Ch. D. 390, 398.
(2) Ibid. 394.
(3) 2 Dow. & C. 188.
(4) 3 Beav. 78.
(5) Law Rep. 7 H. L. 802.

is a misfeasance or breach of trust. An agent to buy stands in the same position as an agent to sell, and *Dunne* v. *English* (1) shews that the profit made by the agent can be arrested by the principal.

The principle of those cases, in which a vendor of property to a company has given part of the purchase-money to a trustee for the company, applies. In such cases it has been held that the company can recover from the trustee or director the money thus paid to him. In *Orgill's Case* (2), it was, no doubt, held that the company could not do this unless they repudiated the contract for purchase. But this was overruled by the Court of Appeal in *Hay's Case* (3), and it is now well settled that in such a case the contract need not be rescinded. We are only asking relief similar to that which is given to a *cestui que trust* against a trustee who has employed the trust money in his business; the *cestui que trust* has in such a case the option of taking the profit derived from the employment of the money.

Davey, Q.C., *Webster*, Q.C., and *Farwell*, for *Fenn*, and *F. C. Norton* for the liquidators, were not heard.

PEARSON, J., stated the facts as they appeared from the evidence on behalf of the applicant, and said:—

In so stating the facts I desire it to be expressly borne in mind that I have not heard Mr. *Fenn's* counsel, and that, in deciding the case upon the applicant's opening alone, I am obliged to assume many things as proved, which, if I had heard Mr. *Fenn's* counsel, might have been altered or attenuated; and, when I state these matters as facts, I am assuming in the applicant's favour that he has proved many things which I am aware are really in dispute between the parties. I desire also to say that my judgment is limited to the facts before me. I do not intend to lay down any new rule of law, and I sincerely hope that, in the conclusion at which I have arrived, I am following the previous decisions which ought to guide me.

His Lordship continued:—When the case was first opened I

(1) Law Rep. 18 Eq. 524. (2) 21 L. T. (N.S.) 221.
(3) Law Rep. 10 Ch. 593.

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understood the application was to make Mr. *Fenn* responsible for £42,000, but it was afterwards admitted that he could not be made liable for the whole of that sum, and that at all events there must be deducted from it the sum which was originally given for the three coal areas, in round numbers £5500. The amount for which it was sought to make Mr. *Fenn* liable was in the course of the argument still further reduced in this way; it was said that, if the 3000 shares, which formed part of the price paid by the company, were not worth £10 each, they were saleable for at least £6 13*s.* 4*d.* each, and that, if Mr. *Fenn* was not liable to be charged with the full nominal value of the shares, he ought at least to be charged with their selling value. In principle it matters very little whether he ought to be charged with the whole nominal amount or only with the selling value, and I shall not, therefore, consider the question whether, if he is liable at all, he ought to be charged with the one or with the other.

Now the only allegation made against Mr. *Fenn* is this, that being, as a partner in the *Coal Area Association*, interested in these properties, and being also a promoter and a director of the *Cape Breton Company*, and the other directors of that company having been nominated more or less by himself and those who were associated with him, he sold these coal areas to the company without disclosing the fact that he was interested in them as a part owner. That, I repeat, is the only allegation against Mr. *Fenn*. No legal fraud is charged against him, no misfeasance of any kind is charged against him except this, that in this transaction, which took place in December, 1873, he was practically seller as well as agent for the buyer, and that he was seller without the knowledge of the *Cape Breton Company*.

That being so, what is it that I am asked to do? There is no attempt to rescind the contract which was made in December, 1873. At the present moment, as the facts stand, that contract could not be rescinded, because it is in evidence that in 1880 these properties were sold in the liquidation of the company. But, there being no attempt whatever to rescind the contract, it is nevertheless said that, Mr. *Fenn* being seller and also agent for the buyer,—seller to the company without disclosing to them that he, being one of their directors, was also interested in the property

sold,—ought to be made responsible for what is called the profit which he gained upon the transaction, and that profit is said to be the difference between the sum which the coal areas originally cost, and the amount (including the value of the shares) which the company gave for them, that is to say, if you take the extreme amount, he should be made liable for £42,000 less £5500.

The question, and, to my mind, the only question, which I have to decide is, whether that is the relief which this Court will give as against a person whose only fault is that he has sold to persons for whom he was acting as agent without disclosing to them the fact that he was the seller of the property. Upon the authorities, as well as on principle, I have come to the conclusion that that is not the relief which the Court will give in a case of this kind. The relief which the Court will give is to rescind the contract, if the parties are willing to rescind it, but the Court will not, because the agent who sold to his principal, without informing him that he was really the seller, was in error in so doing, compel him to pay back to his principal the difference between the price at which he bought the property, it may be years before, and the price which he obtained for it from his principal. Nor will the Court, as was pressed upon me by Mr. *Cookson*, ascertain what was the market price of the property at the time of the sale to the principal, and say that the principal is entitled to recover back from his agent the difference between the sum which he paid him and that which the Court ascertains to have been the market price at the time. I think that in the numerous cases which have been cited to me there is really no difference whatever in the *dicta* upon this question. If I go back to the early case of *Rothschild* v. *Brookman* (1), I find that there the contract was set aside. In *McPherson* v. *Watt* (2), Lord *Blackburn* lays down the rule thus (3): "The mere fact, therefore, that he does not disclose that he is a purchaser, or that he is interested in the purchase, in cases where the client might say, 'It was your duty to give me such advice,' gives the client a right, upon discovering the fact that the purchaser was, in whole or in part, the attorney whose duty it was to give him advice, to say, 'I have an option

(1) 2 Dow. & C. 188. (2) 3 App. Cas. 254.
(3) 3 App. Cas. 272.

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either to set the purchase aside, if I please, or to let it stand if I prefer to do so;' he is entitled to say, 'This may be a very fair and proper bargain, but I do not choose to let it stand.'"

I do not see the slightest hint in either of those cases that the principal is entitled to say, "I will insist upon holding you to the bargain, and upon your paying me back the excess of price which I contend I have paid you." But when I come to the case of *In re Ambrose Lake Tin and Copper Mining Company* (1), it seems to me that Lord Justice *Cotton* has expressly dealt with this subject, and has laid down that which I believe to be the rule to be deduced from all the authorities in the clearest possible manner. Speaking of the order which had been made by the Vice-Warden of the Stannaries Court in that case, he said (2): "As I understand his order, he has done this; he has allowed each of the appellants in the two appeals such a sum as was paid by him on his acquisition of the shares in the mine in question, and then, giving credit for that, has charged him with the difference between that sum and what he considers as the value of the shares. The principle of the order must be this, that the company are at liberty to treat these persons as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and, if they got anything else out of the coffers of the company, to make them account for that. Neither on principle nor on authority can that be maintained, unless, at the time when the so-called vendor acquired the property, he either acquired it for the company or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. In that case what the Court does is to go back to the original purchase made by the person who afterwards purports to sell to the company at an advanced price, and to say, this was already the company's at the price which you originally gave for it when you were a trustee for the company. That price you are entitled to receive out of the coffers of the company, and anything else is a sum paid to you for nothing, which you are not entitled to retain. But here, as far as I under-

(1) 14 Ch. D. 390.

(2) 14 Ch. D. 398.

stand the evidence and the judgment, there is no ground for suggesting that, at the time when Mr. *Moss* acquired his interest in the cost-book mine, he was acquiring it as a trustee for the company, nor do I understand that is suggested as regards the other partners in the cost-book mine. The suggestion is that they bought, being both owners of the mine and trustees for the company; that they could not legally do this; and that, therefore, the company, not seeking to set aside the transaction, may say, 'We will take this at its fair value, and make you account for the difference.' How can that be done? I can quite understand an action to set aside the contract altogether, but that is not the course adopted by the company. I can see no ground, either on principle or authority, on which the company can say, not seeking to set aside the contract, 'We will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it.' I am of opinion that this cannot be maintained."

Now really, substituting the names in the present case for the names in that case, every word which I have read from Lord Justice *Cotton's* judgment might be said here. These coal areas had been purchased by the association of which Mr. *Fenn* was a member for themselves. The *Cape Breton Company* was not then in existence. There can be no doubt whatever that at that time the members of that association or partnership had a right to deal with the coal areas in any way they pleased, and, indeed, Mr. *Bentinck's* counsel very fairly admitted that they cannot put their case so high as to say that, at the time when Mr. *Fenn* and his partners in the *Coal Area Association* purchased these properties, they purchased them for the *Cape Breton Company*, or can be considered as having been trustees for that company. That being so, there was no trust existing at that time of which any breach could be committed, and when afterwards they sold the properties to the company, except for the fact that Mr. *Fenn* and Mr. *Baker* were directors, it would have been a sale by

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strangers to the company. The only objection, therefore, is that when they sold to the company, being themselves directors of the company, they did not state to the company what their interest in these coal areas was. But, that being so, if I were to make Mr. *Fenn* liable for the price given by the company, *ultra* what the coal areas originally cost the association, I should, to use the words of Lord Justice *Cotton*, be making a new contract, leaving the old contract standing, because I am not asked to rescind it. I am in fact asked to give judgment against Mr. *Fenn* upon the supposition that a new contract had been entered into to sell these coal areas to the company at the price at which they were originally bought, and I am clearly of opinion that it is absolutely impossible to do that.

Not only do I find the rule stated with the greatest possible clearness by Lord Justice *Cotton*, in the passage which I have quoted, but I find that Lord *Cairns*, in advising the House of Lords in *Erlanger* v. *New Sombrero Phosphate Company* (1), seems to take exactly the same view of the law. In that case there had been a purchase of the *Sombrero Island* in August, and a company was formed in September, to which the persons who were promoters of the company sold the property in November, and a part of the relief sought originally, when the case came before Vice-Chancellor *Malins*, was that *Erlanger* and his partners, having purchased the island for £55,000 and sold it to the company for £110,000, should repay to the company the £55,000 which was in excess of the sum they had given for it. That is exactly the relief which is sought in the present case. The applicant seeks to charge Mr. *Fenn* with the difference between the price which the company gave and the original sum which these coal areas cost. When the *Sombrero Case* was before Vice-Chancellor *Malins* (2), that point was considered by him in his judgment. He said (3), "I am of opinion that the claim of the company to have the purchase-money reduced to £55,000, on the ground that Baron *Erlanger* and those associated with him were their agents in making the purchase at that price, cannot be sustained. If they had been such agents it would have been clear that they

(1) 3 App. Cas. 1218. (2) 5 Ch. D. 73.
(3) 5 Ch. D. 91.

could not against their principals have stipulated for any advantage to themselves." Then he went on to discuss *Gover's Case* (1), as to which he said (2), "But that the purchase of the property, with the view to the formation of a company, does not make the purchaser a promoter of the company after it is formed, or oblige him to sell the subject of the purchase at the price he gave for it, or upon any other terms than such as he may think proper, has been recently decided by *Gover's Case*." I read that to shew that the point was raised before the Vice-Chancellor, that he considered it, and that he decided it in the negative. I admit that this point was not referred to in the judgments of the Court of Appeal, and my recollection of the case is not sufficient to enable me to say how far the point was raised, or what became of it in the course of the argument on the appeal. But when Lord *Cairns* (who differed on one point from the other Lords who advised the House of Lords) was disposing of this part of the case, he said (3), "The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the resale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the Judges in the Courts below." I conceive that in that sentence Lord *Cairns* is expressing his agreement with what the Vice-Chancellor had decided, and with that which, I believe, was substantially decided by the Judges of the Court of Appeal, viz., that inasmuch as it was not proved that the purchase in August, 1871, was made in any sense for the benefit of the company, or by persons who could be considered as being then trustees for the company, it was impossible to give that relief. If that be so, the same rule of law must, in my opinion, apply to the case now before me, which, when stripped of all extraneous circumstances, resolves itself into the same thing. There was a purchase made in 1871 by a partnership of certain coal areas, and a sale of those coal areas in 1873 to a company of which some of the partners were directors. The

(1) Law Rep. 20 Eq. 114; 1 Ch. D. 182. (2) 5 Ch. D. 91.
(3) 3 App. Cas. 1235.

PEARSON, J. 1884 *In re* CAPE BRETON COMPANY.

property was not purchased for the company. It was not purchased by persons who at that time were in any sense trustees for the company. The result is that the company have the choice, as they please, either to affirm the contract or to rescind it. If they had chosen to rescind it I do not for one moment say that they would not have the right to do so under the circumstances. But the third course which they propose to take, viz., to keep the property and ask the vendors practically now to enter into a new contract with them, and to be considered as having sold the property to them, not for the price at which they agreed to sell it, but for the price at which they themselves had purchased it, is a relief which, I think, is unknown to this Court, and a relief which I cannot give them.

And it seems to me that it would be most dangerous to attempt to give any such relief. I am asked to attempt, in the year 1884, to ascertain what was the market price of this property in the year 1873, when it was sold to the company, and if I find that the market price was then less than that which was given for it by the company, to make Mr. *Fenn* responsible for the difference.

Now, in the first place, I am not aware that Mr. *Fenn* and his partners were bound to sell at the market price, and I cannot understand why this Court is to take the market price or any other price. A vendor has a right to stipulate for what price he pleases; it is for the purchaser to say whether he will give that price or not. Why, therefore, I should say that in the year 1873, the vendors of this property were bound to sell at the market price, I do not know. In the next place, I wish to know how I am to arrive at the damages? The only evidence which I have before me at the present moment is, that the property was bought for one price and was sold for another, and I am asked to assume that the company have suffered damages to the amount of the difference between the two. I cannot arrive at that conclusion. For aught I know, Mr. *Fenn* and his partners may have given a great deal more than the property was really worth, and if so, the damages may be a great deal more. Nor can I see that these are damages in any proper sense of the term. There is simply a difference in price, but how I am to measure the damages by the difference in price has not been explained to me,

and I do not know. I can only say that if the Court were to attempt to adopt this measure of justice, it must make its decree always subject to the speculations which the Judge for the time being might be able to formulate to himself upon the loss which the company or the purchaser had sustained, a decree which would be uncertain in the last degree, and which in numbers of cases would lead to the grossest possible injustice either to the vendor or to the purchaser. In cases like the present, where there has been no legal fraud, where the vendor has simply, either from ignorance or error, abstained from giving the purchaser, his principal, all that information which the Court very properly considers that he ought to give, the vendor may very reasonably say, "I was willing to sell for that price, but, if I had been told I should receive a smaller price, I should have declined to sell at all." I can conceive cases (especially cases like the present) in which a vendor might say, "I am perfectly willing to take a certain sum *in præsenti* for my property. But I believe that the property will increase in value, and, if you decline to give that sum, I would rather keep the property myself than take a smaller sum." It seems to me that, if I were to do what is asked, I should not be acting on any rule of justice between the parties, but making an attempt in ignorance and upon mere guess to determine the damages which the purchaser has suffered.

Under these circumstances, assuming all which has been stated to me on the part of the applicant to be accurate, I do not see how I can give any relief whatever, and I must, therefore dismiss the summons with costs.

This will include the costs of any affidavits which have been filed by the Respondent.

Solicitors for Applicant: *Harper & Battcock.*
Solicitors for Respondent: *Dollman & Pritchard.*
Solicitors for Liquidators: *Norton, Rose, & Co.*

W. L. C.

PEARSON, J.

1884

March 1.

In re SOUTAR'S POLICY TRUST.

Policy of Life Assurance for benefit of Wife and Children of Assured—Petition for Appointment of Trustees—Title of Petition—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 11, 22.

A petition (presented since the coming into operation of the *Married Women's Property Act*, 1882), for the appointment of trustees of the proceeds of a life policy effected by a husband, under the provisions of the *Married Women's Property Act*, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the Act of 1882.

IN April, 1877, a husband effected a policy of insurance on his own life, for the benefit of his wife and children. The policy was effected under the provisions of the *Married Women's Property Act*, 1870, and was so expressed. He died in August, 1883. This was a petition by the widow and her infant children for the appointment of trustees of the policy, and its proceeds, which had not yet been paid by the insurance company. The petition was entitled in the matter of the Act of 1870.

S. Hall, for the Petitioners, submitted that it was unnecessary to entitle the petition in the matter of the Act of 1882. The Act of 1870 had been repealed by the Act of 1882, but sect. 22 of that Act provided that the repeal should not affect any act done or right acquired while the Act of 1870 was in force. Therefore, the power given to the Court by sect. 10 of the Act of 1870 to appoint a trustee of the policy money remained in force.

PEARSON, J.:—

I doubt whether sect. 10 of the Act of 1870 remains in force for any purpose, because sect. 11 of the Act of 1882 says that, if at the time of the death of the insured there shall be no trustee, a trustee or trustees "may be appointed by any Court having jurisdiction under the provisions of the *Trustee Act*, 1850, or the Acts amending and extending the same." It says, not that the

appointment may be made under those Acts, but that it may be made by any Court having jurisdiction under those Acts. The petition had better be entitled also in the matter of the *Trustee Acts*, and in the matter of the Act of 1882.

Solicitors: *Phelps, Sidgwick, & Biddle.*

W. L. C.

C. A.
1882
CHITTY, J.
Nov. 20.
C. A.
1884
Jan. 16.

In re BRIER.
BRIER *v.* EVISON.

[1881 B. 113.]

Executors and Trustees—Loss by Insolvency of Agent—Onus probandi.

A common order having been made for the administration of a testator's estate, the district registrar by his certificate found the outstanding personal estate to consist in part of book debts amounting nominally to £291, as to £113 part of which he certified that it represented a portion of book debts which the executors had employed *H.* to collect, and for which *H.* had not accounted, and had claimed to deduct £55 for remuneration, but that £25 was enough. The certificate went on to say that *H.* had gone into liquidation, and that no part of the £113 was likely to be recovered. No application was made to vary this certificate. It appeared that *H.* had collected in all £168, had paid to the executors in April, May, and June, 1880, sums amounting in all to £55, and had gone on collecting without making any further payment to the executors till July, 1881, when a receiver was appointed in the action, but it did not appear when he became insolvent nor at what times the moneys received came to his hands. The action having come on for further consideration:—

Held, by *Chitty*, J., that the executors having received the £113 by their agent must be charged with it, less the £25 which the Registrar had held to be the proper amount of remuneration to the agent for collecting:—

Held, on appeal that this decision must be reversed, for that where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to shew that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was.

THIS was an action commenced in the *Halifax* district registry by the widow and children of *John Brier* against *Evison* and *Buckton*, the trustees and executors of his will, for administration of his real and personal estate. An order for the common accounts and inquiries was made on the 28th of June, 1881, under General Order xv., rule 1. The statement of claim alleged a case of misconduct against the executors and trustees, but the order contained nothing relating to it. A receiver was appointed on the 20th of July, 1881.

The Registrar of the *Halifax* District Registry made his certificate dated the 20th of April, 1882, and thereby found that

the executors had received personal estate to the extent of £516 6*s.* 2*d.*, and were entitled to be allowed in account £450 10*s.* 1*d.*, leaving a balance of £65 16*s.* 1*d.*, of which £42 19*s.* 10*d.* was in their hands, and £22 16*s.* 3*d.* at a bank to their credit. He found that the debts still owing amounted to £202 15*s.* 10*d.* As to outstanding estate he reported as follows: "The personal estate outstanding and undisposed of consists of household furniture in the possession of testator's widow, and of numerous small book debts owing to testator, amounting nominally to £291 6*s.* 11*d.* Particulars of these book debts appear in the schedule to the affidavit of *John Evison* and *Henry Buckton*, filed the 17th day of October, 1881, and to be filed herewith, and a considerable portion appear to be bad debts. As to one item in the last-mentioned particulars of £113 3*s.* 9*d.*, I have specially to report that it represents a portion of book debts owing to testator, placed by the Defendants in the hands of one *Joseph Hobson* to collect and collected by him, but which he has not accounted for to the executors, but has claimed to deduct in account £44 18*s.*, an arbitrary sum, as his commission for collecting the debts. I consider £25 to be ample remuneration, and the claim beyond that illegal as well as exorbitant. I have to add that this *Joseph Hobson* has lately petitioned for liquidation, and no part of this debt is likely to be recovered. Evidence on this matter appears in the affidavit of *Joseph Ward*, the receiver in this action, filed the 10th day of October, 1881, and to be filed herewith."

The affidavit of *Evison* and *Buckton* referred to in the certificate set forth a long list of small book debts amounting to £134 3*s.* 2*d.*, stating a great number of them to be bad, and then contained these items.

	£	*s.*	*d.*
"Amount in the hands of Mr. *Hobson* on account of debts collected by him, less £55 paid executors as by their balance sheet. From this sum Mr. *Hobson's* charges have to be deducted	113	3	9
"Balance due from Mr. *Pollard* on his promissory note	44	0	0
	£291	6	11

C. A. 1884 *In re* BRIER. BRIER v. EVISON

The £55 mentioned above was paid by *Hobson* to the executors by four payments in April, May, and June, 1880, and he continued to act as collector till the appointment of the receiver on the 20th of July, 1881, without making any further payment to the executors.

The affidavit of the receiver referred to in the certificate related only to the exorbitance of *Hobson's* charge for collecting the debts.

No application was made to vary the certificate, and the case came on for further consideration before Mr. Justice *Chitty* on the 20th of November, 1882. Several affidavits were produced on both sides as to *Hobson's* fitness to be appointed collector. The executors deposed that the testator had kept his books in a most irregular way, and that *Hobson*, who had been employed by him in his lifetime, was the only person who could understand them, and was in other respects a most proper person to collect the debts, while the witnesses on the other side alleged him to be a person of scanty means, and in all respects unfit for the office.

Romer, Q.C., and *Bonser*, for the Plaintiffs, contended that the executors were liable for the defaults of their agent *Hobson*, and cited *Bostock* v. *Floyer* (1).

Ince, Q.C., and *J. Beaumont*, for the Defendants, *contrà*, cited *Mayer* v. *Murray* (2), *Job* v. *Job* (3), and *In re Bird* (4).

CHITTY, J., said the Court must be guided by the facts appearing on the Registrar's certificate, and that on the construction of the certificate and reading the various parts of it together, he must hold that the Registrar had found as a fact that the executors had received the money by their agent, and accordingly that they were bound, according to the ordinary rule applicable to such cases, to make good the loss that had occurred through his default. He therefore reluctantly came to the conclusion that the executors must account to the estate for the sum in question, and accordingly made an order declaring that the Defendants

(1) Law Rep. 1 Eq. 26.
(2) 8 Ch. D. 424.
(3) 6 Ch. D. 562.
(4) Law Rep. 16 Eq. 203.

ought to account for the £113 3*s.* 9*d.* as being personal estate of the testator received by *Hobson* by their order and for their use, less the sum of £25 fixed by the certificate as the remuneration for the collection thereof.

G. I. F. C.

The Defendants appealed, and the appeal was heard on the 16th January, 1884.

Joseph Beaumont, for the appeal:—

The certificate finds that this is outstanding estate which has been lost, but there is no finding that it has been lost by the wilful neglect or default of the executors. Order LV., rule 70, of the rules of 1883 is to the same effect as the old rule on the subject, you cannot go behind the certificate. The Judge went on *Bostock* v. *Floyer* (1), and treated this as a point of law arising on facts sufficiently appearing on the certificate.

[FRY, L.J.:—Cannot the Court direct now an inquiry as to wilful neglect and default?]

It is against the practice to direct it without a case being properly made: *Job* v. *Job* (2); *Mayer* v. *Murray* (3); *Luke* v. *Tonkin* (4). Up to the last Orders there was nothing to extend the power of the Court as to dealing with wilful neglect and default, and it cannot have been intended, in introducing forms adapted to simple cases, to give liberty to deal with these special cases at any chance moment. A special case must be made so as to allow to the party attacked a fair opportunity of defending himself. Nothing can be done against us here without altering the certificate. A common account has been directed, and there is a finding on that footing. Trustees cannot be charged with loss arising from the failure of a person with whom trust moneys are deposited unless the loss happens through their own wilful default: 22 & 23 Vict. c. 35, s. 31.

[EARL OF SELBORNE, L.C.:—Where a person has received money by an agent does not the onus lie on him to shew a good reason why the money is not forthcoming?]

(1) Law Rep. 1 Eq. 26.
(2) 6 Ch. D. 562.
(3) 8 Ch. D. 424.
(4) 21 Ch. D. 757.

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If he shews that the agent has misappropriated the money the burden is on the other side to shew that the principal's negligence led to the loss: *Speight* v. *Gaunt* (1) and cases there cited; 22 & 23 Vict. c. 35, s. 31. Here the property consisted of small book debts, and it must be taken that an agent was properly employed to collect them, for his remuneration has been allowed by the order appealed from. There is nothing before the Court to shew that the executors were in any way to blame.

Romer, Q.C., and *W. Baker, contrà*:—

The certificate as it stands is sufficient for our purpose. It shews that the executors received by their agent £113 3*s.* 9*d.*, and there is nothing to shew why they should not be charged with that sum.

[COTTON, L.J.:—Can we say that they ought to be so charged without knowing something as to the circumstances under which the money was lost?]

The affidavit verifying the account of receipts and payments contains the requisite materials.

[FRY, L.J.:—Is it a matter of course that the affidavits referred to in the certificate can be read when there is no summons to vary it? To lay down such a rule would immensely increase the expense of further consideration, for it would make it necessary to deliver briefs of the affidavits.

Beaumont:—I do not object to any affidavit mentioned in the certificate being read now.

COTTON, L.J.:—That relieves us from deciding the question whether the Respondents are entitled as a matter of right to read them.]

[The affidavits were accordingly considered, but did not throw any material light on the circumstances under which the money was lost, as it did not appear from them when *Hobson* became insolvent nor at what times the moneys came to his hands, but only that he went on receiving moneys till July, 1881, without paying anything over to the executors after June, 1880.]

(1) 22 Ch. D. 727, 742; 9 App. Cas. 1.

[EARL OF SELBORNE, L.C.:—I am disposed to think that the onus is on you to shew that the executors were negligent. Suppose the money had been at a bank which failed, would it not be on you to shew that the money ought not to have been there?]

If the Court is not satisfied on the present materials, we ask for a further inquiry.

EARL OF SELBORNE, L.C.:—

I think that in this case the burden of proof is upon the Respondents who seek to charge the executors with this money. The statute 22 & 23 Vict. c. 35, s. 31, provides, in effect, that trustees shall not be responsible for any banker, broker, or other person with whom trust moneys have been deposited (which I understand to mean properly deposited) unless it can be shewn that that loss happened through their own wilful default. The statute incorporated, generally, into instruments creating trusts the common indemnity clause which was usually inserted in such instruments. It does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law, and appears to me to throw the *onus probandi* on those who seek to charge an executor or trustee with a loss arising from the default of an agent, when the propriety of employing an agent has been established. In the present case, the learned Judge in the Court below has virtually decided that this was a case of proper employment of an agent for a proper purpose, and, as far as I can judge, the nature of the case justifies that view. There were numerous small book debts to be collected; we do not know much as to the circumstances of the executors, but it would be according to the ordinary course of business that they should not personally collect them, but should employ some proper and respectable person for that purpose. The testator was a coal merchant, one of his executors a biscuit manufacturer, and the other an accountant. There is nothing to shew that it would not be a reasonable and proper way of discharging the duty incumbent on the executors for them to employ an agent to get in the small debts, and the Court below has held that it was so by allowing £25 as a remuneration, which

C. A. 1884 *In re* BRIER. BRIER *v.* EVISON. Earl of Selborne, L.C.

if the executors received this money they would have been entitled to pay to the agent for collecting it, and the decision of the Court on that point is founded on the opinion expressed in the certificate by the Registrar, that he considered £25 to be ample remuneration; which in fact came to this, that in his view that was the proper amount to be allowed for the remuneration of the agent. Therefore, on the judgment under appeal, and on the certificate, it seems to me that we must assume the employment of the agent to have been right. Then if a person seeks to charge the executors with a loss arising from the default of an agent whom it is admitted to have been reasonable to employ, does it not lie on him to inform the Court of the circumstances under which the loss arose, the time during which the money was in the agent's hands, the time at which the insolvency took place? This having been done, the executors, on the other hand, would have an opportunity of shewing what efforts they had made and what means they had used for getting in the money and what, if any, were the difficulties in their way. Now, it appears to me here, that the person on whom the *onus probandi* lies has failed to inform the Court of the circumstances which it was absolutely necessary for the Court to know, before it could come to the conclusion that the loss by the agent's insolvency was due to some wilful default on the part of the executors. That being so, I cannot help thinking that the judgment now appealed from is erroneous, and ought to be reversed; and we do not think that as to so small an amount we ought to direct any further inquiry.

COTTON, L.J.:—

I am of the same opinion.

FRY, L.J.:—

I am of the same opinion.

Solicitors for Plaintiffs: *Burn & Berridge.*
Solicitors for Executors: *Learoyd & Co.*

H. C. J.

STRICKLAND *v.* SYMONS.

C. A.
1884
Feb. 8, 9.

[1881 S. 968.]

Trustee—Carrying on Business—Advances—Charge of Trustee—Right of Creditor against Trust Funds.

By a marriage settlement a lunatic asylum was assigned to trustees on trust at the request of the husband and wife to sell and stand possessed of the proceeds of the sale for the benefit of the wife and children; but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement:—

Held, that, whether the trustee would or not have been entitled to be indemnified for moneys advanced by him for the purposes of the asylum, the tradesman had no right to recover his debt out of the trust funds, no special part of the estate having been appropriated for carrying on the asylum.

Ex parte Garland (1) considered.

THIS was an appeal from a judgment of Baron *Pollock* (2).

The facts, which are stated at length in the previous report, were shortly as follows:

By the marriage settlement of Dr. and Mrs. *Sabben* a lunatic asylum at *Stoke Newington* was conveyed to trustees upon trust to sell the same with the goodwill thereof, and to stand possessed of the proceeds for the benefit of Mrs. *Sabben* and the children of the marriage. But it was declared that until the trust premises were sold it should be lawful for Dr. *Sabben* to carry on the business of an asylum upon the said premises without paying any rent for them other than the rents payable under the leases thereof, but paying to the trustees certain sums of money thereafter covenanted to be paid, namely, a sum of £10,000, payable by instalments, and the premiums on certain policies of insurance.

Dr. *Sabben* carried on the business of the asylum for his own

(1) 10 Ves. 110.

(2) 22 Ch. D. 666.

C. A. 1884 STRICKLAND v. SYMONS.

benefit till July, 1875, when he filed a petition for liquidation, and a trustee was appointed. Immediately on the liquidation, Dr. *H. E. Symons*, the surviving trustee of the settlement, entered into the management of the asylum with a view, as alleged by the Plaintiff, to the preservation of the business and to a sale thereof as a going concern under the trusts of the settlement. He carried on the business till April, 1876, when the asylum was sold for £18,500.

The Plaintiff, *J. R. Strickland*, was an upholsterer at *Gravesend*, who had supplied the asylum while it was being carried on by Dr. *Symons* with furniture. A balance of £500 was due to him, for which sum, with interest and costs, he had recovered judgment in the Common Pleas Division against Dr. *Symons*. The money not having been paid by Dr. *Symons*, the Plaintiff brought the present action against Dr. *Symons* and Dr. and Mrs. *Sabben* and their children claiming to be paid the amount of his judgment debt out of the trust funds.

Mr. Baron *Pollock* gave judgment for the Defendants, and the Plaintiff appealed from the judgment.

Higgins, Q.C., and *Dauney*, for the Appellant:—

Dr. *Symons* carried on the asylum for the benefit of the trust estate. If he had himself advanced the money for the furniture he would have been entitled to indemnity out of the trust funds. Even if he had not been a trustee he would have been entitled to be recouped any money which he advanced as salvor of the property. In either case the Plaintiff is entitled to stand in his place and be paid out of the trust funds. The settlement directed that the asylum should be sold with the goodwill, so it was necessary to carry on the asylum in order to preserve the goodwill: *In re Johnson* (1); *Attorney-General* v. *Corporation of Norwich* (2); *Bright* v. *North* (3); *In re Leslie* (4); *Owen* v. *Delamere* (5); *Ex parte Garland* (6); *Ex parte Edmonds* (7); *Fraser* v. *Murdoch* (8).

(1) 15 Ch. D. 548.
(2) 2 My. & Cr. 406.
(3) 2 Ph. 216.
(4) 23 Ch. D. 552.
(5) Law Rep. 15 Eq. 134.
(6) 10 Ves. 110.
(7) 4 D. F. & J. 488.
(8) 6 App. Cas. 855.

[EARL OF SELBORNE, L.C., referred to *Labouchere* v. *Tupper* (1).]

Barber, Q.C., and *Kirby*, for Mrs. *Sabben*, and *S. T. Moore*, for the other Defendants, were not called on.

EARL OF SELBORNE, L.C.:—

This action has been rightly described in the course of the argument as an action to enforce the Plaintiff's lien, but you cannot enforce a lien without shewing that it exists. There is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property. There is not the least authority for such an action as the present. It is an action for an equitable execution against the trust estate in respect of a judgment against the trustee. There is no evidence of any contract for any security on any part of this estate. There was only an ordinary contract for goods supplied to a person who happened to be a trustee. The mere fact that the customer was carrying on an asylum which was subject to a trust would not give the tradesman the right to be paid out of the trust fund. The trustees of the settlement with respect to the asylum were to sell it, with certain consents, and to deal with the proceeds of sale as therein mentioned, and there was a power that until the premises should be sold it should be lawful for Dr. *Sabben* to carry on the business of an asylum upon the premises for his own benefit, he making certain payments. This he did until July, 1875, when he got into difficulties, and became a liquidating debtor, and then Dr. *Symons* continued to carry on the asylum, and for the purposes of the business he contracted this debt. Nothing can be more plain than that on the face of the settlement there is no dedication or application of the trust property to any trade purposes, and no provision that the business was to be carried on by the trustees. It was argued that as it was intended that the asylum should be sold and the goodwill with it, it was intended that the goodwill should be preserved, and therefore it was necessary and proper that the trustee should continue to carry on the asylum after Dr. *Sabben* gave it up, for

(1) 11 Moo. P. C. 198.

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the purpose of preserving the goodwill. That might have been a very sound argument if used between the trustee and the *cestuis que trust* for the purpose of justifying him and shewing that he was entitled to an idemnity. But that is not the question here. On this settlement it is clear that it was intended that the asylum should be carried on by Dr. *Sabben* and not by the trustees; and that if he did not carry it on, it should be sold with the goodwill. It is therefore impossible to compare the case with *Ex parte Garland* (1), and *In re Johnson* (2), and the other cases where there has been an express direction by the testator to carry on a business, and where he specially appropriated part of his property for that purpose. Those authorities proceed on this principle, that where a particular part of a trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned. But the authorities tend to limit that doctrine rather than to extend it. The case of *Ex parte Garland* shews that the creditor can only have recourse to the particular part of the property of which there has been such an express dedication; and the right cannot be extended beyond that, either in bankruptcy or in administration. And that applies even to cases in which the trustee has merely done his duty in carrying on the business, and where he may be entitled to an indemnity for the expenses incurred by him. *In re German Mining Company* (3) and *Labouchere* v. *Tupper* (4) are cases in which the distinction is laid down between the rights of trustees carrying on business to be indemnified for expenses *bonâ fide* incurred where there are no particular assets appropriated, and the rights of creditors. Under such circumstances the creditors have no rights against the trust estate. The doctrine contended for by the Appellant is not only not supported by *Ex parte Garland*, but is opposed to it. The appeal must therefore be dismissed with costs.

(1) 10 Ves. 110.
(2) 15 Ch. D. 548.
(3) 4 D. M. & G. 19.
(4) 11 Moo. P. C. 198.

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COTTON, L.J.:—

I agree, for the reasons stated by the Lord Chancellor.

FRY, L.J.:—

I also agree, for the same reasons.

Solicitors for Appellant: *Harries, Wilkinson, & Raikes*, agents for *Sharland & Hatten, Gravesend.*

Solicitors for Respondents: *E. Smith & Co.; W. J. Smith; W. R. Helmore.*

M. W.

HARVEY *v.* CROYDON UNION RURAL SANITARY AUTHORITY.

C. A.
1883
PEARSON, J.
Dec. 14.
C. A.
1884
Jan. 24;
Feb. 4, 5, 13.

[1883 H. 3425.]

Consent Order—Facts not mentioned to Court—Withdrawal of Consent.

An action was brought against a local board to restrain them from pulling down certain houses of the Plaintiff's, and for damages. On a motion for an injunction coming on, the Defendants' counsel, by the authority of his clients, consented to an order for a perpetual injunction, with costs, and an inquiry as to damages, and such order was taken by consent without opening the case to the Court. Before the order had been passed, the Defendants formally withdrew their consent, and the Registrar thereupon declined to pass the order without the direction of the Court. The Plaintiff moved that he might be directed to proceed to perfect the order. The Defendants alleged that their instructions to consent had been given under a misapprehension, but did not enter into any evidence in support of that allegation:—

Held by *Pearson*, J., that up to the time of a consent order being passed, any party can withdraw his consent, except where he consents to a decree of the Court after the case has been before the Judge, and that the application must be refused:

Held on appeal, that where counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, and that the Registrar must be directed to proceed to perfect the order, without prejudice to any application which the Defendants might make to the Court below to be relieved from their consent, on the ground of mistake or surprise or for other sufficient reason.

THIS was a motion on behalf of the Plaintiff that the drawing-up, passing, and entering of the order made in this action on the

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15th of August, 1883, might be proceeded with, and that the Defendants be ordered to pay the costs of this application.

The writ was issued on the 4th of August for an injunction to restrain the Defendants, the *Croydon* Union Rural Sanitary Authority, from pulling down certain of the Plaintiff's houses, and on the 8th of August an interim order was made in the terms of the motion until the 15th of August. The case was then put into the list for further hearing for the 15th of August, before Mr. Justice *Pearson*, the vacation Judge.

On that day, no further evidence having been filed, terms were arranged between the counsel on both sides, and the following is a copy of the indorsement upon the briefs: "*Pearson*, J., August 15, 1883. By consent treat motion as trial and set down. Perpetual injunction according to notice of motion until the terms of the *Towns Improvement Act*, 1847, have been complied with. Defendants to pay costs of action up to and including the hearing. Usual inquiry as to damages. Reserve costs of inquiry. Liberty to apply." The Plaintiff's solicitors then left the usual papers with the Registrar, and wrote to the Defendants' solicitors asking them to leave their briefs also. This they did on the 17th of August. The Registrar's clerk then proceeded to draw up the order and the draft of such order was given out to the Plaintiff's solicitors.

On the 20th of August notice was given to the Defendants that an appointment had been taken to settle the order on the following Wednesday, but on the morning of that day the Defendants' solicitors asked for a postponement for a day or two, as they had to communicate with the country.

On the 24th of August the Defendants' solicitors wrote to the Plaintiff's solicitors formally withdrawing their consent to the order, on the ground that the instructions given to counsel were given under an entire misapprehension. Correspondence then took place between the parties, and though the Plaintiff's solicitors had requested to know what the entire misapprehension was, they had received no explanation. The letter of the 24th of August having been produced before the Registrar he declined to proceed with the order. This notice of motion was consequently given, and the motion was heard on the 14th of December,

1883. No evidence that the instructions had been given by misapprehension was produced.

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Swinfen Eady, in support of the motion :—

We have ample authority to shew that when the parties to an action have consented to an order with the full knowledge of what they are consenting to, and where there is no misapprehension on the part of the consenting parties, then there can be no withdrawal of the consent.

This was a perfectly simple case, and it is not stated that there was any misapprehension whatever of the facts of the case. In *Holt* v. *Jesse* (1) Vice-Chancellor *Malins* used this very conclusive expression : " If consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has been the rule of this Court, and I also trust it never will be the rule of this Court, that the unfortunate client should be bound by such misapprehension. But here, where the whole facts are stated in a page and a half, where the counsel who ask me to decide this do not pretend to say that they were not in possession of every material fact which was necessary to their consent in the case, and the solicitors do the same, and the defendant himself was in the same position, I think if I were to accede to this application it would be a general license to parties to come to this Court and deliberately give their consent, and afterwards, at their will and pleasure, come and undo what they did inside the Court, because on a future day they find they do not like it. It appears to me that this application is altogether groundless and unjustifiable, and I dismiss it with costs."

In *Attorney-General* v. *Tomline* (2) Mr. Justice *Fry* decided that after a judgment by consent had been passed and entered it could not afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. In that case there really was a mistake, and at the trial the defendant's counsel were not acquainted with the true facts of the case ; and in *Davis* v. *Davis* (3) it was held that a compromise agreed to by the

(1) 3 Ch. D. 177, 184. (2) 7 Ch. D. 388. (3) 13 Ch. D. 861.

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parties in Court could not afterwards be varied on the mere allegation that the consent was given inadvertently, without evidence of mistake or misapprehension. Suppose a defendant submits to an injunction and withdraws his consent before the order is passed and entered, and then commits a breach of the injunction, there could be no attachment issued because there would be no order; or suppose there were as many as ten different points in a case, and the attention of the Court having been called to one point only, the parties came to an agreement on the other nine points, the consent order as to the nine points might be afterwards withdrawn, and the whole order would be upset.

John Henderson, for the Defendants.

PEARSON, J.:—

In all the cases which have been cited the facts in dispute were brought to the knowledge of the Court, and the compromise or consent order was made with the sanction of the Court. This is a very different case. Here the compromise was entered into by the parties out of Court, and the order was agreed to by counsel without any knowledge by the Court of what the circumstances were. When a case is settled by the parties without the intervention of the Court, it is, in my opinion, competent for either party before the order is drawn up to say they would like to have the opinion of the Court. Here the Court was merely informed that an order had been consented to, and the order was made in accordance therewith. On the other hand, if a consent is given by the counsel on behalf of their clients in Court after the whole case has been before the Judge, then the order is that of the Judge himself. Where the parties simply agree between themselves to an order, then the Court is not required to exercise any judgment in the matter. In one case the Court exercises its judgment but in the other it does not. In *Holt* v. *Jesse* (1) the Court was fully aware of the whole circumstances of the case, and the Vice-Chancellor expressed his opinion that the order was such as no reasonable human being could have objected to, for it was a decree made in concession to him. In *Attorney-General* v.

(1) 3 Ch. D. 177.

Tomline (1) the ground upon which Mr. Justice *Fry* decided that the order could not be varied, was that it had been passed and entered, and, moreover, in that case the facts were within the defendant's own knowledge, and in the interval between the trial and the drawing-up of the order there was ample time for him to have made an application to have the judgment varied. So in *Davis* v. *Davis* (2) the whole facts were before the Court when the order was made, and the Court was satisfied that the applicant understood what was done on her behalf, and the Judge considered the terms very favourable to her. Mr. Justice *Fry* in that case made this observation, "I do not say anything as to whether a consent given altogether without the intervention of the Court can be afterwards withdrawn," and his Lordship then referred to his previous decision in *Attorney-General* v. *Tomline* in these terms, "All I said in that case was that if in any case a judgment made by consent can be varied, it must be varied before it is drawn up." However, in *Rogers* v. *Horn* (3) the late Master of the Rolls distinctly decided that an order by consent might be varied at any time before the order was passed and entered. Therefore it comes to this, that there is an absolute decision in favour of allowing the case to be brought on, and there is no authority to the contrary. I must consequently refuse the motion, but without costs.

T. W. G.

C. A.

The Plaintiff appealed, and the appeal was heard on the 24th of January and the 4th, 5th, and 13th of February, 1884.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Appellant:—

We contend that a consent given by a party with full knowledge of the facts, and with the advice of his legal advisers, cannot be withdrawn. If it is given under a mistake, then it can only be withdrawn on application to the Court, and under such terms as the Court thinks fit to impose: *Furnival* v. *Bogle* (4); *Holt* v. *Jesse* (5); *Attorney-General* v. *Tomline*. He cannot withdraw his consent of his own motion. Mr. Justice *Pearson* followed

(1) 7 Ch. D. 388.
(2) 13 Ch. D. 861.
(3) 26 W. R. 432.
(4) 4 Russ. 142.
(5) 3 Ch. D. 177.

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Rogers v. *Horn* (1), but there there was an application to the Court. *Davis* v. *Davis* (2) is also in our favour. A contract was entered into, the terms of which were contained in the indorsements on counsels' briefs. If not a compromise, it was still an agreement for value, the discontinuance of litigation being a sufficient consideration: *Cook* v. *Wright* (3). There is no decision that a party who has given his consent can arbitrarily withdraw it, there are only *dicta* by the late Master of the Rolls which do not appear in the authorized reports. The practice in the Common Law Divisions is settled in our favour, and the Court will adopt that practice as being the most convenient and conformable with principle: *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (4).

[*Craven* v. *Stanley* (5) was also referred to.]

Lumley Smith, Q.C., and *John Henderson*, *contrà*:—

We contend that where the case has not been opened before the Court at all, a consent may be withdrawn: *Holt* v. *Jesse* (6) applies only to a compromise in Court. *Trotter's Claim* (7) supports our contention. *Furnival* v. *Bogle* (8) was a case of compromise in Court, and this principle runs through all the cases on which the Appellant relies. Moreover, in the present case the consent was given by mistake, and if the Court is against us on the other ground, we ask for leave to adduce evidence of this.

Swinfen Eady, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Pearson*, declining to direct a consent order to be drawn up. The Lord Chief Justice has asked me to deliver judgment first, as the question has arisen in the Chancery Division. Mr. Justice *Pearson* considered it to be settled that a consent could be withdrawn at any time before the order was drawn up, without

(1) 26 W. R. 432.
(2) 13 Ch. D. 861.
(3) 30 L. J. (Q.B.) 321.
(4) 13 Ch. D. 310.
(5) 20 Sol. J. 542.
(6) 3 Ch. D. 177.
(7) 13 Ch. D. 261.
(8) 4 Russ. 142.

regard to the question whether there was any mistake or error in giving the consent. If a consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the order has not been drawn up. But the question is very different whether when counsel, being duly authorized, have given a consent, there being no mistake or surprise in the case, the party can arbitrarily withdraw that consent. This is the first occasion on which the Court of Appeal has been called upon to decide this point, though the late Master of the Rolls laid down that even in the absence of mistake the consent might be withdrawn. Since this case was opened I have searched for authorities on the subject in order to discover whether the point was settled as supposed by Mr. Justice *Pearson*. If it is not so settled by authority, I think that his decision cannot be sustained. If a consent has been duly given, it is not right that it should be arbitrarily withdrawn. Then are we bound by authority to hold that it may? The case of *Rogers* v. *Horn* (1) certainly supports that view, but there are others which tend in the opposite direction, as *Furnival* v. *Bogle* (2) and *Holt* v. *Jesse* (3). In these cases there was something in the nature of compromise, and the decisions may be referable to there being an agreement for valuable consideration, but the remarks of Lord *Lyndhurst* in *Furnival* v. *Bogle* are strong, and do not put the matter on the ground of there being a binding agreement. In *Seton* on Decrees (4) *Holt* v. *Jesse* is referred to as deciding that where a party with knowledge of the facts authorizes his counsel to consent, and the consent is given, he cannot afterwards withdraw it, but there again the case was one of compromise. There being, however, no authority which is binding on us to the contrary, we must decide according to what we think the right course, and it must be understood henceforth to be the rule that a consent given by the authority of the client cannot be arbitrarily withdrawn. Probably in the state of the authorities Mr. Justice *Pearson* could not do otherwise than he did, but the Court of Appeal is in a different position, and the authorities are not in such a state as to prevent our laying down what we

(1) 26 W. R. 432.
(2) 4 Russ. 142.
(3) 3 Ch. D. 177.
(4) Page 1536.

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consider to be the right rule, and which is in accordance with the practice established in the Queen's Bench Division.

LORD COLERIDGE, L.C.J.:—

I asked Lord Justice *Cotton* to give judgment first in this case, because it turns on the practice in the Chancery Division, with which I am not familiar. In the Queen's Bench Division this case would not have been arguable, it being quite settled there that a consent given by counsel with authority and with full knowledge of the facts is binding and cannot be withdrawn. I agree with the Lord Justice *Cotton* that this is the right rule, both in the interest of counsel and of those who employ them.

An order was accordingly made that the drawing up the order should be proceeded with without prejudice to any application which the respondents might make to Mr. Justice *Pearson* to be relieved from the consent on the ground of mistake or surprise, or any other ground which would induce the Court to say that they ought not to be bound by the consent.

Solicitors for Plaintiff: *Corsellis, Son, & Mossop.*
Solicitors for Defendants: *Henderson & Buckle.*

H. C. J.

FRANCE *v.* CLARK.

C. A.
1884
Jan. 30;
Feb. 19.

[1881 F. 1262.]

Company—Pledge of Shares—Blank Transfer.

F., the registered holder of shares in a company, deposited the certificates with *C.* as security for £150, and gave him a transfer signed by *F.*, with the consideration, the date, and the name of the transferee left in blank. *C.* deposited the certificates and the blank transfer with *Q.* as security for £250. *C.* died insolvent, after which *Q.* filled in his own name as transferee, and sent in the transfer for registration. The shares were accordingly registered in *Q.'s* name, but whether this was done before notice given by *F.* to the company and to *Q.* that *F.* denied the validity of the transfer, was doubtful on the evidence:—

Held, affirming the decision of *Fry*, J., that *Q.* had no title against *F.* except to the extent of what was due from *F.* to *C.*

A person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument.

If a debtor delivers to his creditor a blank transfer by way of security, that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract.

Ex parte Sargent (1) observed upon.

THIS was an appeal by the Defendant *Quihampton* from the decision of Mr. Justice *Fry* (2), and was argued on the 30th of January, 1884.

The facts were shortly as follows:—On the 10th of February, 1881, the Plaintiff, who was the registered holder of ten fully paid-up shares in the *Anglo-Egyptian Banking Company*, deposited the certificates, together with a transfer of the shares executed by himself, in which the date, the name of the transferee, and the consideration, were left in blank, with *F. S. Clark* as security for £150. The articles of association contained a provision that all transfers of shares should be subject to the approval of the directors. Afterwards *Clark* deposited the certificates and the blank transfer with *Quihampton* as security for £250 lent by him to *Clark*. In April, 1881, *Clark* died insolvent. On the 22nd of

(1) Law Rep. 17 Eq. 273. (2) 22 Ch. D. 830.

C. A. 1884 FRANCE v. CLARK.

June, 1881, *Quihampton* inserted in the transfer the date, and his own name as transferee, and on the 24th sent in the transfer for registration. On the 27th of June the solicitors of the Plaintiff, who had received the usual notice that a transfer of his shares had been sent in, wrote to the bank not to register the transfer, and also wrote to *Quihampton* stating that the Plaintiff claimed the shares. A certificate that the ten shares belonged to *Quihampton* was signed on the 30th of June, but was not given out to him.

On the hearing before Mr. Justice *Fry* it was stated, but not proved, that the shares had been registered in the name of *Quihampton*. The Court of Appeal determined to hear evidence on this point, and two witnesses were examined and the register produced. It appeared from the register that *Quihampton* was registered as owner under the date of the 24th of June, but neither of the witnesses could state when the entry was made. They were examined as to whether any consent to the transfer had been given by the directors before the 30th of June, but could not give any information on the subject. The evidence in the cause tended to shew, though it did not appear distinctly, that there had not been any meeting of the directors between the sending in of the transfer and the 30th of June.

Mr. Justice *Fry* decided that *Quihampton* had no claim against the shares except to the extent of what was due from the Plaintiff to *Clark*.

Glasse, Q.C., and *J. F. Popham*, for the Appellant:—

Ex parte Sargent (1) decided that in a case like this the lender to whom the deed executed in blank is delivered, can fill up the blanks, and the deed will be effectual in favour of the person whose name is inserted. *Re Tees Bottle Company* (2), *Ortigosa* v. *Brown* (3), *Goodwin* v. *Robarts* (4), and *Rumball* v. *Metropolitan Bank* (5) support this view. There may be equities between the depositor and depositee, but with those a *bonâ fide* transferee for value without notice has nothing to do. It is urged that the

(1) Law Rep. 17 Eq. 273.
(2) 33 L. T. (N.S.) 834.
(3) 47 L. J. (Ch.) 168.
(4) 1 App. Cas. 476.
(5) 2 Q. B. D. 194.

notice to the bank on the 26th of June affects the case, but that is answered by *Dodds* v. *Hills* (1).

[COTTON, L.J.:—Has it ever been decided that the giving a blank transfer enables the depositee to enable a transferee from him to fill up the blanks?]

Yes; the transfer was not filled up by the original depositee either in the case of *Re Tees Bottle Company* (2) or *Ex parte Sargent* (3).

Mr. Justice *Fry* relied much on the principle that a pawnee cannot sell. We do not say that he can generally do so, but he may in the case of a negotiable instrument. The point in *Story* on Bailments mentioned by Mr. Justice *Fry* is answered by § 322 of the same work. The company might have refused to register the transfer, but they did register it. A person who puts the indicia of property into the hands of another person must, as between himself and third parties, be bound by the dealings of that person. The Plaintiff had no right to stop the registration of the shares, for he did not offer to redeem them.

Cozens-Hardy, Q.C., and *Kirby*, for the Plaintiff:—

Much of the argument has turned on authorities relating to negotiable instruments, but we are not here dealing with such instruments. In *Goodwin* v. *Robarts* (4) and *Rumball* v. *Metropolitan Bank* (5), it was established that the instruments were negotiable. The entry in the register is on the 24th of June, but evidently this arose from dating the registration as of the day on which the transfer was sent in. The evidence shews that the assent of the directors cannot have been given till the 30th. Where a loan is made and a blank transfer of shares delivered, the depositee may no doubt fill in the transfer for the purposes of the loan; but he does not acquire a right to sell. The Appellant wishes to go far beyond *Ex parte Sargent*. It may well be that a transferee of the debt may fill up the transfer for the purpose of the loan, but filling it up for the purpose of a sale which was not authorized is quite another matter. In the *Tees Bottle Case* there was proof of

(1) 2 H. & M. 424.
(2) 33 L. T. (N.S.) 834.
(3) Law Rep. 17 Eq. 273.
(4) 1 App. Cas. 476.
(5) 2 Q. B. D. 194.

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an original agreement authorizing what was done, which is wanting here. In *Dodds* v. *Hills* (1) there was a deed filled up and duly executed. If the observations in that case apply to the present they are inconsistent with *Shropshire Union Railways and Canal Company* v. *The Queen* (2), which covers the present case. There is no authority one way or other on the point whether the rules as to pledges of corporeal chattels apply to shares or choses in action. The remarks in *Story* on Bailments (3) apply only to cash and negotiable instruments. *Clark* could not put *Quihampton* in a better position than himself. Every person to whom the blank transfer was produced was put upon inquiry as to the extent of the authority to fill it up.

Glasse, in reply :—

Roffe v. *Roscoe* (before the Court of Appeal on the 13th of June, 1879) is in my favour on the last point.

[COTTON, L.J. :—In that case there was authority for the depositee to sell.]

A person handing over documents enabling another to deal with shares is estopped from disputing his dealings with them. Even if the consent of the directors was not merely ministerial and was not given till after the notice of the Plaintiff's claim, still the transfer was complete as between transferor and transferee before the notice.

Feb. 19. The judgment of the Court (Earl of *Selborne*, L.C., *Cotton* and *Lindley*, L.JJ.), was now delivered by

EARL OF SELBORNE, L.C. :—

The Plaintiff in this case, having occasion to borrow £150 from a person named *Clark* in February, 1881, and being entitled to ten fully paid-up shares of £20 each (not purporting to be transferable to bearer, but registered in his own name) in the *Anglo-Egyptian Banking Company*, deposited with *Clark*, as a security for repayment of that amount, the certificates of those shares, together with an instrument in the form of a deed of transfer, which he signed, leaving the date, the consideration,

(1) 2 H. & M. 424. (2) Law Rep. 7 H. L. 496. (3) § 322.

and the name of the transferee, all in blank. Very soon after he had received these documents, *Clark*, without the Plaintiff's knowledge, handed them over in the same state in which he had received them to the present Appellant, Mr. *Quilhampton*, by way of security for an antecedent debt of £250 due to the Appellant from himself. Having done this he (*i.e.*, *Clark*) died in the following April, and after *Clark's* death the Appellant, without any communication with the Plaintiff, filled in his own name as transferee of the shares, and sent them in for registration to the company. In the register book of the company the Appellant appears registered as owner of those shares. But it is at least doubtful whether there was any authorized registration, and if so, whether it had been effected before notice had been given both to the Appellant and to the company, that the Plaintiff denied the validity of the transfer and objected to the removal of his name from the register.

That *Clark* could and did transfer to the Appellant the benefit of his own pledge or equitable mortgage by deposit, so as to entitle the Appellant to stand in his shoes as to the £150 due to him on that security, and the interest thereon, was not disputed by the Plaintiff; and the order now under appeal has, to that extent, given the Appellant the full benefit of *Clark's* security. But the Appellant claims more than this. He insists that he took the documents of title from *Clark* as a purchaser for valuable consideration without notice of the Plaintiff's rights; that, when he filled up the blanks in the instrument of transfer, that instrument became legally operative, so as to give him a legal title to have the shares registered in his name; and that, being so registered, he is entitled to hold them against the Plaintiff, or to sell them, for the purpose of realising the full amount due to himself from *Clark*. On these points he has failed in the Court below.

The principal ground, as we collect it, of Mr. Justice *Fry's* decision, was, that the Appellant's legal right could not be to anything more than that which *Clark*, as between himself and the Plaintiff, could lawfully transfer; that *Clark's* legal right to the documents which he handed over to the Appellant was at the most that of a bailee by way of pledge; and that nothing

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had occurred to justify in law a sale or alienation of the pledge to the prejudice of the Plaintiff's right. We do not dissent from these propositions; but we think the same conclusion (viz., that *Clark* could only transfer to the Appellant, by handing over these documents, such rights as he himself then had against the Plaintiff) would be reached not less clearly, and perhaps more simply, if *Clark* were regarded in the light of an equitable mortgagee of the shares, which he certainly was.

The defence of purchaser for valuable consideration without notice, by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us to be altogether untenable. The observations of *Bramwell*, B., in *Hogarth* v. *Latham* (1), and of *Stuart*, V.C., in *Hatch* v. *Searles* (2)—both cases of negotiable instruments, which this is not—and also of *Turner*, L.J., in *Tayler* v. *Great Indian Peninsula Railway Company* (3), are opposed to any such notion, and so are plain and clear principles of justice and reason. The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a *bonâ fide* holder; and a man who, after taking it in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English Courts as entitled to the benefit of that doctrine. He must necessarily have had notice, that the documents required to be other than they were when he received them, in order to pass any other or larger right or interest, as against the person whose name was subscribed to them, than the person from whom he received them might then actually and *bonâ fide* be entitled to transfer or to create; and if he makes no inquiry he must at the most take that right (whatever it may happen to be) and nothing more. He cannot, by his

(1) 3 Q. B. D. 643, 647.
(2) 2 Sm. & Giff. 147, 152.
(3) 4 De G. & J. 559, 574.

own subsequent act, alter the legal character, or enlarge in his own favour the legal or equitable operation, of the instrument. This, in our opinion, renders it unnecessary to consider whether, before the registration was completed, the company and the Appellant had notice of the Plaintiff's claim; for registration in the name of a transferee only gives complete effect to a prior valid transfer; registration does not make effectual a document which was, as between the alleged transferor and transferee, inoperative and of no effect.

It was said that when a man, in a transaction for value, does what this Plaintiff did, and delivers a blank form of transfer to a creditor by way of security, together with the certificates of shares, his meaning must necessarily be that the creditor may complete his security by obtaining registration of the shares, either in his own or (possibly) in some other name; and that he, therefore, intrusts him with the requisite authority for that purpose. Granting this, what follows? Only that the creditor to whom such an authority is given may execute it or not, for the purpose of giving effect to the contract in his own favour, as he pleases; but not that, if he does not execute it, he can delegate the like authority to a stranger for purposes foreign to and possibly (as in this case) in fraud of that contract.

The blank form of transfer in the present case conferred no legal title when the Appellant took it from *Clark*, because, on the face of the instrument, there was no transferee; and this the Appellant knew. The Appellant certainly had no authority from the Plaintiff to insert his own name as transferee, and we think that *Clark* could give him no such authority, especially for a purpose which, as between the Plaintiff and *Clark*, would have been fraudulent. The filling up of the blank by the Appellant with his own name was, in our opinion, so far as any legal effect is concerned, a mere nullity, as in *Hibblewhite* v. *M'Morine* (1), *Swan* v. *North British Australasian Company* (2), and *Tayler* v. *Great Indian Peninsula Railway Company* (3), whether the instrument ought to be regarded as an imperfect deed, or in any other light. In point of fact the instrument purports to be under seal.

(1) 6 M. & W. 200.
(2) 7 H. & N. 603; 2 H. & C. 175.
(3) 4 De G. & J. 559.

C. A. 1884 FRANCE v. CLARK.

But it was pressed on us that the Plaintiff had, by the blank transfer and certificate, enabled *Clark* to represent himself as the true owner of the shares, or as having power to deal with the shares as owner. The documents themselves shewed that *Clark* was not the owner. Nor was there any evidence of any mercantile usage to the effect that holders of such documents as *Clark* handed over to *Quilhampton* are treated as having the right to transfer shares referred to in the documents, as if such holders were the owners of such shares. In other words, there is no evidence that, as a matter of fact, blank transfers, accompanied by certificates of shares registered in the names of transferors, pass from hand to hand like negotiable instruments. The absence of any such evidence of mercantile usage not only distinguishes this case from *Goodwin* v. *Robarts* (1), but renders the reasoning on which that case was decided wholly inapplicable to the case now before us, and makes it unnecessary for us to consider whether such a usage, if proved, would be sufficient to make a document of this particular nature negotiable in law. Nor is the absence of any such evidence a mere oversight; for it is worthy of notice that the Defendant in his statement of defence pleaded a mercantile usage to the effect above mentioned, and then struck it out. It would, under these circumstances, be unreasonable for him to expect the Court to decide this case upon the assumption that there is such a usage. The inference is rather that no such usage can be shewn to exist. It was contended that the cases of *Ex parte Sargent*, before the late Master of the Rolls (2) and *Roffe* v. *Roscoe*, before the Court of Appeal (but not reported) shew that the holders of such documents can transfer them so as to confer a good title to *bonâ fide* holders for value without any other notice of the nature of the transferor's title than the documents themselves give. There are, no doubt, some expressions in the judgments in those cases which may seem capable of being interpreted in this sense. But the facts of those cases must not be lost sight of in studying the judgments pronounced in them.

The case of *Ex parte Sargent* was upon an application to rectify the register of a company by substituting the name of *Sargent* for that of *Fry*, who, being the registered owner of certain

(1) Law Rep. 10 Ex. 76, 337; 1 App. Cas. 476. (2) Law Rep. 17 Eq. 273.

shares, had signed a transfer in blank to *Cannon*, by way of security; and *Cannon* had transferred it in the same state to *Sargent*, who afterwards filled in his own name. *Sargent* does not appear to have claimed to stand as more than a transferee, with a right to get in the legal title, of such interest as *Cannon* had when he handed over the documents, and the Master of the Rolls relied upon the power of every mortgagee "to reborrow and to transfer his security." There were several communications between *Fry* and *Sargent* after the transfer, which may, perhaps, have been thought to amount to ratification; and the Master of the Rolls said that Mr. *Fry's* own counsel had admitted *Sargent's* equitable right to have the shares transferred to him, which admission, in his Lordship's judgment, covered the legal right also. If the case is to be thus explained, it is not an authority in point on the present occasion; if not, we should not be prepared to follow it. *Roffe* v. *Roscoe* was a very different case. *Roffe* wished to enable *Henry* to raise money, and gave him the certificate of the stock and a blank transfer to enable him to effect a transfer of the stock to some one who would advance the money. *Henry* got money from *Roscoe* and handed to him the documents, and the name of *Roscoe* as transferee was filled in either by *Henry*, or by *Roscoe* by *Henry's* authority. This was known to and (in effect) ratified by *Roffe*. It was conceded that this was a due execution of the authority given by *Roffe* to *Henry*, that there had been an effectual transfer of the stock to *Roscoe*, and that under the circumstances the mortgage to him authorized, in the events which happened, a sale. The question was, whether he had properly paid to the trustee of *Henry* the balance of the purchase-money arising from the sale, and that depended on the question whether he had notice that *Roffe* retained an interest in the equity of redemption. The decision of those points in *Roscoe's* favour has no bearing on the present case.

We think that this appeal must be dismissed with costs.

Solicitors for Plaintiff: *Edward Smith & Co.*
Solicitors for *Quihampton*: *Morley & Shirreff.*

H. C. J.

C. A.
1883
CHITTY, J.
Feb. 6.
C. A.
1884
Jan. 31;
Feb. 19.

HOLYLAND *v.* LEWIN.

[1881 H. 4772.]

Will—Special Power of Appointment—Death of Appointee in Lifetime of Testator—Child of Testator—Wills Act (1 *Vict. c.* 26), *s.* 33 [*Revised Ed. Statutes, vol. viii., p.* 36.]

The 33rd section of the *Wills Act*, which enacts that a devise or bequest to a child of the testator who dies in the lifetime of the testator leaving issue shall not lapse does not apply to an appointment under a special power.

Freme v. *Clement* (1) disapproved.

SPECIAL CASE.

William Lewin, by his will, dated the 25th of January, 1847, gave all his real estate to trustees in trust for his wife, *Ann Charlotte Lewin*, until she should marry again, or alien the annual income, or become bankrupt, and after her death, in case she should be then unmarried and in the enjoyment of the annual income, in trust for all or any one or more of his children, grandchildren, or other issue (such grandchildren or other issue to be born in the lifetime of his said wife), in such shares, and with such directions or regulations, and to be vested at such ages as his said wife should by will or codicil direct or appoint, and in default of such direction or appointment, in trust to sell the same real estates, and to divide the proceeds in equal shares among his children. And the testator declared that his said wife should under the power thereinbefore given to her have the same power to appoint or give to any one or more of his children, grandchildren, or other issue (to be born as aforesaid), all or any part of his real estate, either absolutely or with such directions or regulations as aforesaid, or to trustees with the usual power to sell and dispose thereof, and to pay the clear money arising therefrom to such children, grandchildren, or other issue (born as aforesaid) as he had then or should have if living at the death of his said wife.

The testator died on the 20th of November, 1854.

(1) 18 Ch. D. 499.

Ann Charlotte Lewin, his widow, by her will, dated the 27th of March, 1868, in exercise of the power given by the will of her husband, appointed the said real estate to two trustees, of whom the Plaintiff was the survivor, upon trust to sell and to hold the proceeds as to one-third share thereof in trust for *Francis Braithwaite Lewin*, a son of her late husband, his executors, administrators, and assigns absolutely; and as to one other third share in trust for the five children of *William Lewin*, another son of her late husband, who was dead, in equal shares; and as to the remaining third share in trust for the benefit of *Ann Charlotte Pochin*, the daughter of her late husband.

Ann Charlotte Lewin died on the 25th of December, 1880, without having done anything to forfeit her life estate under her husband's will.

The testator left no other children besides those named in the will of *Ann Charlotte Lewin*, namely, *Francis Braithwaite Lewin*, *W. Lewin*, and *Ann Charlotte Pochin*.

Francis Braithwaite Lewin died in August, 1873, before his mother, leaving a widow and three children, of whom the Defendant *Francis Lewin* was his heir-at-law.

Four of the children of *William Lewin*, the son, also died in the lifetime of *Ann Charlotte Lewin*, without issue. The surviving child, *George Frederick Lewin*, was a Defendant to the action.

The Plaintiff brought an action to have the trusts of the wills of *William Lewin*, the testator, and his wife carried into execution; and this special case was stated under Order XXXIV., rule 1.

The principal question for the opinion of the Court was whether the appointed share of *Francis Braithwaite Lewin* lapsed by his death in the lifetime of the testatrix, *Ann Charlotte Lewin*.

The various Defendants were appointed by the Court to represent the different classes interested.

The special case was heard before Mr. Justice *Chitty* on the 6th of February, 1883.

Whitehorne, Q.C., and *E. Ford*, for the persons interested in contending that the share appointed to *Francis Braithwaite Lewin* had not lapsed.

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Macnaghten, Q.C., *Ince*, Q.C., *Fellows*, and *Solomon*, for various persons interested in contending that the share had lapsed.

Romer, Q.C., and *Warmington*, Q.C., for the Plaintiff.

CHITTY, J.:—

In this case the question is, whether the 33rd section of the *Wills Act* applies where an appointment purports to be made by a testator in favour of one of his children who are objects of a special power and the child dies in the testator's lifetime. Now the precise point was decided by the Vice-Chancellor of *England* in *Griffiths* v. *Gale* (1), in the year 1844, but some of the reasoning of the Vice-Chancellor, namely, that part which relates to general powers, has been since disapproved of, and so far as some of the expressions in his judgment are concerned, Sir *W. P. Wood* declined to follow them, evidently considering them as mere *dicta* on the question with relation to general powers of appointment. But otherwise the decision appears to me to remain unaffected except by some observations made by the late Master of the Rolls in the more recent case of *Freme* v. *Clement* (2). The decision itself is one which has got into the text-books. It was approved by Lord *St. Leonards* in the last edition of his work on Powers published in 1861; and in the excellent treatise of Mr. *Farwell*, which is more recent, I find that the decision is spoken of as being correct.

In these circumstances, it appears to me that the decision having now stood for a period of nearly forty years it is too late for a Judge of first instance to overrule it even if he dissented from it.

There are some observations made by Sir *W. P. Wood* in *Eccles* v. *Cheyne* (3) from which I gather that he thought the decision right, although I am not quite sure that some of the observations which he made there were entirely well founded. But there is this ground for saying that the observations which he makes go to support the decision. It is quite plain that on the construction contended for, if the appointment is to take

(1) 12 Sim. 327, 354.

(2) 18 Ch. D. 499.

(3) 2 K. & J. 676.

effect as under the 33rd section, the property does pass to a stranger upon the death of the testator, because the child in whose favour the appointment is made does not in fact survive, but the appointment is to take effect as if he had survived, and the result is that it passes under his will or intestacy in that way to strangers. I make this observation upon the section, and no more, with reference to some remarks addressed to me by counsel on the true meaning of what Sir *W. P. Wood* said and what the Master of the Rolls said in these two cases.

I do not go into the general question. I can see that there are grounds upon which the decision, if it was a new decision, ought to be supported, but it appears to me that the right course for me to adopt is to say that that decision having stood for thirty-nine years, it is now too late for a Judge of first instance to alter it. Men have made their wills no doubt on the footing of that decision, and property has passed upon that decision, and counsel in advising their clients must in many cases have acted on that decision.

On these grounds I think that I must adopt the result of the ancient decision in *Griffiths* v. *Gale* (1).

His Lordship also held that the lapsed share was converted into personal estate.

From this decision the parties interested in contending that the shares had not lapsed, appealed. The appeal came on for hearing on the 31st of January, 1884. C. A.

Whitehorne, Q.C., and *E. Ford*, for the Appellants:—

The 33rd section of the Wills Act, 1 Vict. c. 26, applies to the execution of limited powers, and therefore will prevent the lapse of the share appointed to *Francis B. Lewin*. Mr. Justice *Chitty* thought himself bound by *Griffiths* v. *Gale*, but that case cannot be supported, because the grounds of the decision would also exclude general powers from the operation of the section, and it has been well settled that general powers are within the section: *Eccles* v. *Cheyne* (2); *Sugden* on Powers (3). There is

(1) 12 Sm. 327, 354. (2) 2 K. & J. 676.
(3) 8th Ed. p. 463.

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no distinction in principle between general and special powers in this respect. *Freme* v. *Clement* (1) is a decision in our favour.

Macnaghten, Q.C., and *Fellows*, for *G. F. Lewin*:—

Griffiths v. *Gale* (2) has never been doubted. It is referred to as settling the law in *Freeland* v. *Pearson* (3). The words "devise" and "bequeath" in the 33rd section have a technical sense, and do not include an appointment. If the Appellants' contention is correct, a testator might appoint to a person who was dead when the will was made, which the donor of the power could never have intended. If the share goes into the estate of a deceased child those who take the share will not be objects of the power: *Wisden* v. *Wisden* (4); *Winter* v. *Winter* (5).

Ince, Q.C., and *Solomon*, for *Ann Charlotte Pochin*.

Romer, Q.C., and *Warmington*, Q.C., for the widow of *Francis Braithwaite Lewin*.

S. Williams, for the Plaintiff.

Whitehorne, in reply referred to *In re Hensler* (6); *Eager* v. *Furnivall* (7).

1884. Feb. 19. EARL OF SELBORNE, L.C., delivered the judgment of the Court (Earl of *Selborne*, L.C., *Cotton* and *Baggallay*, L.JJ.) as follows:—

In this case we were asked to overrule a decision of Sir *Lancelot Shadwell* in 1844, upon the 33rd section of the *Wills Act* (1 Vict. c. 26), which provides against lapse by the death in the lifetime of a testator of any child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed, and who shall leave issue who may survive the testator. Sir *L. Shadwell* decided in *Griffiths* v. *Gale* that this provision of the statute did not extend to the case of an appointee

(1) 18 Ch. D. 499.
(2) 12 Sim. 327, 354.
(3) Law Rep. 3 Eq. 658.
(4) 2 Sm. & Giff. 396.
(5) 5 Hare, 306.
(6) 19 Ch. D. 612.
(7) 17 Ch. D. 115.

under a limited power. That decision had the assent and approval of Lord *St. Leonards, Sugden* on Powers (1), and also of Lord *Hatherley* in *Eccles* v. *Cheyne* (2). It was said, and truly, by Lord *Hatherley*, that some of the observations made by Sir *L. Shadwell* were inapplicable, if they were supposed to go beyond the case before him, and to extend to that of a general power. But we see no reason for supposing that the learned Judge who decided *Griffiths* v. *Gale* (3) had, when he made those observations, any other case in view than that which was before him of a limited power.

If the reasons on which *Griffiths* v. *Gale* was decided had been themselves unsatisfactory, there would still be great difficulty in disturbing what has been regarded as settled law for the last forty years, a law on which many titles may possibly depend. But we are ourselves satisfied with the reasons for that decision. The words "devise" and "bequeath" are terms of known use in our law, the former from *Glanville's* time and earlier. In their ordinary sense they signify the declaration of a man's will concerning the succession to his own property after his death. Such a devise or bequest operates (on the subjects which either by common or by statute law, or by custom, can so be disposed of), by virtue of the will, and of that alone. On the other hand an appointment under a limited power operates by virtue of the instrument creating the power, the execution when valid being read into, and deriving its force from that instrument. If the execution of the power must or may be by will, it must be a will duly executed and attested as such, according to law; and the word "will" in the statute extends to such a testamentary appointment. But, that condition being complied with, the execution operates in the same way after the death of the appointor as if the instrument were not testamentary. Before the *Wills Act*, the law as to general powers was the same. "A mere general devise or bequest, however unlimited in terms, would not comprehend the subject of the power unless it refer to the subject or to the power itself, or generally to any power vested in the testator:" *Sugden* on Powers (4).

(1) 8th Ed. p. 463.
(2) 2 K. & J. 676.
(3) 12 Sim. 327, 354.
(4) 6th Ed., vol. i., p. 385.

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It follows, we think, legitimately from these premises, that the words "devise" or "bequest," when used in the *Wills Act* without any indication of an intention that they should apply to appointments under powers, ought, *primâ facie*, to be understood in their ordinary sense, viz., as referring to a gift by will of the testator's own property, and nothing else. Without laying very much stress upon the word "lapse," or upon the improbability that the Legislature could have intended to interfere with the law of powers in an Act relating generally to wills (except so far as such an intention is expressly declared), we think it enough to say that we find nothing in the 33rd section, or in any other part of the Act bearing upon it, which requires any extension of the words "devised" and "bequeathed" beyond their ordinary *primâ facie* sense.

The late Master of the Rolls indeed, in *Freme* v. *Clement* (1), a case decided on the 25th section of the Act, seems to have thought it possible to collect from the general provisions of the *Wills Act* an intention to use those words in a sense *primâ facie* inclusive of appointments under limited as well as general powers. We might have been doubtful of our own opinion if it were merely our own, when we found it opposed to that of so eminent a Judge; but in this case all previous authority is in accordance with it.

The case of general powers is expressly dealt with by the 27th section of the Act, which says that "a general devise" of the real, and "a bequest of the personal" estate of the testator shall be construed to include any real or personal estate which he may have power to dispose of "in any manner he may think proper," and "shall operate as an execution of such power, unless a contrary intention appear by the will;" thus making the subject of a general power part of the property of a testator for the purpose of his testamentary dispositions, and bringing it by positive enactment within the operation of a general "devise" or "bequest," and therefore within the category of "real or personal estate devised or bequeathed" in the terms of the 33rd section, as was decided in *Eccles* v. *Cheyne* (2). But this express legislation as to general powers does not extend either directly or in principle

(1) 18 Ch. D. 499. (2) 2 K. & J. 676.

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to limited powers; on the contrary, it appears to us rather to repel than to support the idea, that the Legislature intended to interfere with the previous state of the law as to the execution of limited powers.

Solicitors: *Lee, Ockerby, & Everington*, for *J. & A. Bright, Nottingham; Field, Roscoe, & Co.*, for *R. & G. Toller, Leicester; W. W. Wynne & Son*, for *Brabner & Court, Liverpool; H. Montagu.*

M. W.

HARVEY *v.* MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY.

C. A. 1883 POLLOCK, B. *Feb.* 13, 14. C. A. 1884 *Feb.* 26, 28.

[1881 H. 4010.]

Rules of Building Society—Loan repayable by Instalments and Premiums—Interest on Premiums—Statutory Receipt—37 & 38 Vict. c. 42, s. 42.

Under the rules of a building society which required that loans upon a mortgage should be repaid by annual instalments and premiums spread over a certain number of years, it was held that the society was justified in adding the whole of the annual premiums to the capital, and charging interest upon the combined amount; and upon the borrower redeeming before the end of the period, he was not entitled to a rebate in respect of the premiums contracted to be paid.

Where a borrowing member of a building society has mortgaged property to the society to secure advances and all payments due from him to the society, and the society on payment off of the mortgage indorses a statutory receipt under the 42nd section of the *Building Societies Act*, 1874, such receipt precludes them from questioning the sufficiency of the payment, and from making any further claim against the mortgagor in respect of the debt.

Sparrow v. *Farmer* (1) distinguished.

THIS was an action against the *Municipal Permanent Investment Building Society*, claiming to have an account taken of what was due from the Plaintiff to the society in respect of certain mortgages, and for repayment of £270 already paid by the Plaintiff under protest upon redeeming the mortgages.

The Defendants were a building society registered under the

(1) 28 L. J. (Ch.) 537.

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Building Societies Act of 1874 (37 & 38 Vict. c. 42), and incorporated in November, 1874. The prospectus of the society under which the Plaintiff became a borrowing member, contained, *inter alia*, the following statements:—

"A borrower receiving an advance will be charged a fixed premium of 2*s.* per share, per annum, and interest is calculated at the rate of £5 per cent. per annum only upon the equity of redemption at the end of each financial year.

"Advances are granted for any period not exceeding twenty-five years upon freehold, leasehold, and copyhold property, and tables of repayment ranging from five to twenty-five years, shewing the monthly repayments required to repay £100, including principal, interest, and premium, are annexed to this prospectus.

"Borrowers can redeem at any time. Under the Act of Parliament which governs this society borrowers incur no liability beyond the performance of their special contract.

"Mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital, with interest to date of redemption."

In the years 1878, 1879, and 1881, the Plaintiff became a borrowing member of the society, and borrowed various sums of money, amounting in the aggregate to £4880, from them, and as security for the repayment thereof gave them mortgages of properties to which he was entitled at *Milton Villas, Addiscombe*, and other places, and mortgage deeds of the respective properties were executed.

In August, 1881, the Plaintiff became desirous of redeeming all the mortgages, and required the Defendants to furnish him with an account of the money due thereon. In answer to this application the Plaintiff was furnished with the gross sum claimed upon each mortgage, amounting in the aggregate to £4589 4*s.* 4*d.*, and upon receiving from the Defendants a more detailed account, the Plaintiff ascertained, as he alleged, that the accounts were made out upon an erroneous principle, and were inconsistent with the terms stated in their prospectus, namely, that mortgages by borrowing members might be at any time redeemed by payment of the balance of the amount of capital with interest to the date

of redemption. The Defendants adhered to the principle upon which the accounts were made out, and after considerable correspondence the Plaintiff paid the society £4443 8*s.* 4*d.* under protest, and this sum was accepted by them.

On the occasion of this payment the mortgage deeds were given up to the Plaintiff, with a receipt indorsed on each deed in the following form, which is the form provided by the *Building Societies Act*, 1874:—

"The *Municipal Permanent Investment Building Society* hereby acknowledge to have received all moneys intended to be secured by the within-written deed. In witness whereof the seal of the society is hereto affixed this 21st day of August, 1881, by order of the board of directors, in the presence of *W. H. Richards* and *Ed. Pulleyne*. *George Marshall*, Secretary. [L. T.]"

The Plaintiff complained that he had paid £270 too much, and brought this action to recover that sum from the society. The Defendants, by their answer, stated that the conditions in the prospectus were wrongly stated by the Plaintiff, and that the clause as to mortgages by borrowing members was that such mortgages might be at any time redeemed by payment of the balance of the amount of capital "and premium," with interest only to the date of redemption.

The Defendants further stated that there was an error in the accounts rendered by them, but that in fact a larger sum was due to them than the amount paid by the Plaintiff, and they claimed, by way of counter-claim, a sum of £427 5*s.* 3*d.* as being still due to them from the Plaintiff.

The Plaintiff in reply stated that the words "and premium," alleged by the Defendants to have been omitted in the Plaintiff's extract from the prospectus were not contained in the prospectus issued in 1878, but had been inserted by the Defendants in a prospectus subsequently published by them. The Plaintiff then set out the two rules of the society applicable to advances and redemption of mortgages which were as follows:

Rule 32. "The directors shall make advances as funds permit, to any amount, repayable in one sum or by mouthly contributions according to the scales and tables hereto annexed, and

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such additional scales and tables as they may adopt. The premiums charged on all mortgages shall be due in advance, but if desired, may be added to the mortgage or paid in cash."

Rule 43. "Any member desirous of redeeming the securities held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines, and interest, and also the present value of the future repayments as ascertained by reference to the tables."

The advances to the Plaintiff were payable in fifteen years by monthly instalments, in conformity with the scale issued by the Defendants, and included and were in respect of interest and premium, the interest being calculated at simple interest at £5 per cent. on the money actually advanced, and for the time being remaining unpaid, and the premium being a fixed premium of 2*s.* per share per annum and not bearing interest.

The Plaintiff then set out in detail a statement of accounts made out according to his view of the principle upon which they should have been settled in respect of the first property, namely, Nos. 1 and 2, *Milton Villas*, and which were applicable to all the other properties. The amount actually advanced on the *Milton Villas*, was £380. The premium charged was £57, being the aggregate amount of a fixed premium of 2*s.* per share on thirty-eight shares, running over fifteen years. The advance with interest and the premiums, were to be paid by monthly instalments of £3 10*s.* 4*d.* each, which amount, according to the statement at the head of Table 11, under which the advance was made, included principal, simple interest, at £5 per cent. and a fixed premium of 6*s.* 4*d.* (such 6*s.* 4*d.* being the monthly contribution in respect of the premium), and by making which monthly payments of £3 10*s.* 4*d.* during and up to the end of fifteen years, the £380 with interest thereon at £5 per cent. and the £57 premium would be fully paid.

The principle upon which the Defendants claimed to charge the Plaintiff, was as follows: that the total premium of 2*s.* per share upon the thirty-eight shares for fifteen years, which amounted to £57, was to be added in the first instance to the £380 advanced, so as to increase the capital to £437, upon which sum interest at £5 per cent. was charged. Then the first monthly

instalments of the year were taken to pay off the interest upon the capital, and the remaining instalments for the year were applied in reduction of capital. Thus, in the first year it required the first six instalments, together with fifteen shillings of the seventh instalment, to pay the interest upon the £437, and the remaining instalments, less 15*s.* amounting to £20 17*s.*, were applied in reduction of capital, and by this mode of calculation the capital at the end of the first year amounted to £416 3*s*; while by the Plaintiff's process of calculation the capital of £380 was reduced to £360 12*s*. And again upon the Defendant's principle the interest for the second year was charged upon £416 3*s*. while the Plaintiff alleged it should be charged only upon £360 12*s*.

The mortgage deed, which was dated the 16th of February, 1878, and was made between the Plaintiff of the one part and the Defendant Society of the other part, recited that the Plaintiff was entitled to a leasehold interest in two houses, known as Numbers 1 and 2, *Milton Villas*, *Addiscombe*, and it recited as follows:

"And whereas the mortgagor having subscribed for forty-four advanced shares in the said society, numbered respectively from 16,240 to 16,283 (both inclusive), and being desirous of borrowing the sum of £380 in respect of such shares, has applied to the said society to lend him such sum for the period of fifteen years, to be computed from the 16th day of February, and has also offered to pay a premium for such advance, which being calculated according to the rules and bye-laws of the said society, amounts to the sum of £57, and is to be added to and treated as part of the principal sum; and to repay such principal sum by 180 advance instalments of £3 10*s*. 4*d*. each, the first of such advance instalments to become due and to be paid on the execution hereof, and the remainder of such advance instalments to become due and be paid respectively on the first day of every month during the said period, commencing with the month of March next." It was then witnessed that in consideration of the sum of £380 paid to the mortgagor out of the funds of the society (such sum making together with the said premium the full amount of his said forty-four advanced shares in the society), the mortgagor did thereby covenant that he would, during the continuance of the security,

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pay to the society all advance instalments, fines, and other moneys (if any) which, according to the agreement and to the rules for the time being of the society, should from time to time become payable in respect of the said forty-four advanced shares, and would also duly observe the rules of the society.

Then followed the usual assignment of the property by way of mortgage, with a proviso that, upon payment by the mortgagor to the society of all advance instalments, fines, and other moneys, which, according to the recited agreement and to the rules of the society, should become payable in respect of the said forty-four advanced shares, then the said indenture should be vacated.

The Plaintiff subsequently borrowed from the society the further sums of £1100, £900, £1700, and £800, and thereupon executed mortgage deeds of other property similar in all respects to the before-recited mortgage of the houses, Numbers 1 and 2, *Milton Villas*, and the Plaintiff upon each occasion subscribed for a proportionate number of shares according to the amount advanced to him. The whole of the advances therefore amounted to £4880.

When the case came on for trial a question was raised as to the jurisdiction of the Court to decide a dispute arising between the society and its members, it having been held in the case of *Wright* v. *Monarch Investment Building Society* (1), that under the rules of the society all such questions must be decided by arbitration; but counsel on both sides having consented not to raise any objection as to jurisdiction the only question submitted to the Court was the principle upon which the accounts between the parties were to be taken.

The action came on for hearing before Mr. Baron *Pollock* on the 13th of February, 1883.

Barber, Q.C., and *W. W. Cooper*, for the Plaintiff:—

It will be seen that the plan pursued by this building society was that there should be investing members and borrowing members, and a member obtaining an advance was required to take a sufficient number of £10 shares to cover the amount of

(1) 5 Ch. D. 726.

capital advanced to him, and, as a premium for the advance, he was required to pay two shillings per share per annum, for the period of the advance—in this case fifteen years—what we say is that interest at 5 per cent. was chargeable only on the actual capital advanced, and from year to year upon the reduced capital, whereas the Defendants claim interest at 5 per cent. upon the premiums which are added to the capital. The Plaintiff, at the end of the first year, instead of finding his capital reduced by £20 12*s.* found it actually increased from £380 to £416 3*s.* And, by this plan, the Plaintiff has to pay the same amount of premiums for the loan extending over three and a half years, that he would have had to pay for fifteen years. It could not be intended by these rules that a borrower should have the 5 per cent. interest to pay upon the premiums. The Defendants' claim cannot be supported either by the prospectus, or the rules, or the mortgage deed. The rule as to mortgages by borrowing members in force at the time the Plaintiff executed his mortgage, did not include the words "and premium," and it was held in *Smith's Case* (1) that borrowing members of a building society were entitled to redeem upon payment only of those sums which they were liable to pay according to the rules in existence at the date of their respective contracts, notwithstanding that by the new rules of the society it was provided that such rules should apply to all the members as well past as future. The plain meaning of these rules is that when a mortgagor redeems he is to pay only the principal due with interest, and he is not to pay interest accruing after the principal has been all paid. That was decided in *Ex parte Osborne* (2); but here, the Defendants, by their mode of calculation, would charge interest upon the premiums falling due after the capital was paid off.

T. Terrell, and *H. Terrell*, for the Defendants:—

We submit that the society are justified by their prospectus and rules in adding the premiums to the capital, and the recital in the mortgage deed makes the matter perfectly clear. The prospectus states that a borrower will be charged a fixed premium of two shillings per share per annum for the term of the advance,

(1) 1 Ch. D. 481. (2) Law Rep. 10 Ch. 41.

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and that mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital and premium, with interest only to the date of redemption. Then by the 32nd rule it is stated that the premiums charged on all mortgages shall be due in advance, but, if desired, may be added to the mortgage or paid in cash. The recital in the deed shews that it was to be added to the principal. No doubt there is as much charged for a short loan as for a loan extending over many years, but the object of the society is that their money shall be kept out at interest, and the effect of the rules is to prevent speculative builders from obtaining money and immediately afterwards repaying it. The loans made by this society are to the full value of the property, and not like ordinary mortgages where the capital seldom exceeds two-thirds of the value. The first question is whether we are entitled to charge interest on premiums and the second is whether, upon the mortgagor redeeming before the time from which the contract runs, that is, the fifteen years, we are entitled to charge the whole of the premiums which the mortgagor originally contracted to pay. It appears by the recital in the mortgage deed that forty-four shares were subscribed for by the Plaintiff, and not thirty-eight shares, which would have been sufficient to cover the £380 advanced, but the forty-four shares actually taken were intended to cover the amount of premiums added to the capital, making the capital £437. This principle of taking the accounts is established in *Seagrave* v. *Pope* (1); *Mosley* v. *Baker* (2); *Matterson* v. *Elderfield* (3): *Solvency Mutual Guarantee Company* v. *Freeman* (4).

Barber, in reply.

POLLOCK, B.:—

I have heard everything that could be urged on behalf of the Plaintiff in this case, and if this Court were sitting with the function of requiring that all the rules and prospectuses drawn by these societies should be perfectly clear to all persons, I think a very useful office might be created for requiring some altera-

(1) 22 L. J. (Ch.) 258.
(2) 18 L. J. (Ch.) 457.
(3) Law Rep. 4 Ch. 207.
(4) 31 L. J. (Ex.) 197.

tions in the prospectuses. But the office I have to perform now, is to say what the contract is between these parties. Before doing so, no doubt the general observations made by Mr. *Terrell* in the beginning of his argument are useful. So far as one takes the scope and object of the society even apart from its rules, the governing principle of this society and of all building societies is to spread an amount which is paid by a borrowing member for the purchase of a house over a certain number of years. That is the intention and the object of the borrowing power, and it is not to enable people who are speculative builders or land jobbers to come into the market backed by the aid of a society of this kind.

That being so, it only remains to be seen what is the real contract between these parties. Now, without any authority I should have thought it was tolerably obvious in this case that the mortgage deed embodying these rules, so far as they are referred to by that deed, is the contract which is binding on both sides. If any authority be necessary, those two cases of *Solvency Mutual Guarantee Company* v. *Freeman* (1) and *Mosley* v. *Baker* (2), cited by Mr. *Terrell* and which are binding upon me, are certainly sufficient.

Now, this mortgage deed, after setting out the ordinary recitals of the premises, has this recital:—"And whereas the mortgagor having subscribed for forty-four advanced shares of the society, numbered respectively from 16,240 to 16,283, and being desirous of borrowing a sum of £380 in respect of such shares, has applied to the said society to lend him such sum for the period of fifteen years, to be computed from the 16th of February, and has also offered to pay a premium for such advance, which being calculated according to the rules and by-laws of the said society amounts to the sum of £57, and is to be added to and treated as part of the principal sum," then comes the provision as to repayment. Now, not merely by letter but in spirit, what is the meaning of this? The meaning of it is that a certain sum is to be borrowed, but that the borrower is content to pay a premium, and that premium is to be added to and treated as part of the principal sum. Then that principal sum is to be paid in accordance with the

(1) 31 L. J. (Ex.) 197. (2) 18 L. J. (Ch.) 457.

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rules of the society, which means to say that the principal sum which now *ex hypothesi* includes the premium is to be paid, not down at once, but to be distributed over a certain number of years. It would, to my mind, be a fallacy to suppose that the principal sum including the premiums can lose its character in any way because it is to be over a number of years. That is the very object of the society—to enable borrowing members to pay, during a number of years what they cannot pay down at any one time. Following that out we then turn to the rules, which are very clear about this head, because the first rule having reference to the subject, which is the 32nd rule, says this:—"The premiums charged on all mortgages shall be due in advance, but, if desired, may be added to the mortgage or paid in cash." That is not in conflict in any way, but is consistent with the provisions in the deed. Then the 43rd rule, which has a bearing on the subject, is this:—"Any member desirous of redeeming the securities held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines, and interest, and also the present value of the future repayments, as ascertained by reference to the tables." Now what does that mean? It means the future value by reference to the table, which table is the distribution, over a certain period, of the money lent, plus the premium. So that it is as if they had referred to the original sum lent plus the premium at any time. Those are the rules, which seem to me not only not to conflict with the mortgage deed, but to be perfectly consistent with it.

It is said that the observations, for they are little more, contained in the prospectus are in conflict with this. I confess I do not quite see that, if the prospectus is read by an intelligent person who understands the scheme of the society. Without at all saying that any complaint ought to be made against this particular society, I have often had occasion to regret that building societies should not frame their rules in a more intelligible form, because one finds (not so much in this society as in other societies, such as insurance and benefit societies), that they hold enormous sums of money which are subscribed by the poorer classes, especially in the north of *England;* so that there should be no mistake in the mind of the most ignorant man as to what

is the contract he is entering into. With regard to this case, when the prospectus is read with the contract, I do not think there is any great doubt about it, because when the repayments are described, it is in this way: "Tables of repayment ranging from five to twenty-five years shewing the monthly repayments required to repay £100, including principal, interest, and premium, are annexed to this prospectus." That leaves open the question entirely, as to what is the character of the premium. Then again "mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital and premium with interest to the date of redemption." That also leaves it open. Interest upon what? Is that interest upon the bare principal lent, or is it interest on the principal and premium? I have already given my reasons for thinking it is interest on the principal and premium. Then again there are these words, "borrowing members" (in addition to a fixed premium of 1 per cent.) "are charged annually only 5 per cent. interest upon the amount remaining unpaid." That also leaves it open, and you must refer to the rules to see what is the amount remaining unpaid; and the next words are those which I have read as to payment of the "amount of capital with interest to date of redemption." What is the amount of capital? That refers again to the mortgage and the rules, and it seems to me that "capital" for this purpose includes premium, so that it is, as in all these societies, some arrangement whereby a larger amount of interest is obtained than actually appears under the name of interest. Whether that is done by calling it premium paid down, or premium distributed over a number of years according to the option of the borrower, or whether it is done by entrance fees or occasional fees, is immaterial. But so it is, and the misfortune is that it needs somebody who has had experience of these transactions to ascertain that the borrower is really paying more than the 5 per cent. The answer, however, is this —societies of this kind are mutual societies, but, in any case, whether they be or be not, they can scarcely carry on their business with the risks they run except by having something to cover more than the ordinary interest which would be paid on a sum of money advanced and properly secured. These are only

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matters of observation, and perhaps I might refrain from making them altogether; but I use them to shew that the document is one that is not unusual or reprehensible.

There was one question I ought to have asked, which of these mortgages were after 1880?

Barber, Q.C.:—Only one, with the alteration in the rules. Your decision against me on the first four of the five will practically cover the fifth.

POLLOCK, B.:—Then there will be judgment for the Defendants on the claim and on the counter-claim with costs.

T. W. G.

C. A.

The Plaintiff appealed from so much of the judgment as decided in favour of the counter-claim on the ground that the Defendants were estopped by the form of their receipt from saying that any further sum was due from the Plaintiff. When the appeal first came on, the Respondents objected that this point was not raised by the pleadings; and the hearing of the appeal stood over with leave to the Plaintiff to amend his pleadings. The appeal came on for hearing on the 26th of February, 1884.

Barber, Q.C., and *W. W. Cooper*, for Appellant:—

This appeal is confined to the additional sum claimed by the Defendants by their counter-claim, and we contend that they are bound by the statutory receipt indorsed upon the deeds. By the 42nd section of the *Building Societies Act*, 1874 (1), the

(1) 37 & 38 Vict. c. 42, s. 42. "When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in *England* or *Ireland* have been fully paid or discharged, the society may endorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to this Act; and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or resurrender whatever."

indorsement of such a receipt is conclusive; and it is enacted that such receipt shall vacate the mortgage or further charge or debt, and vest the estate in the person entitled to the equity of redemption.

A. Charles, Q.C., *H. Terrell* (*T. Terrell*, with them), for the Defendants:—

The statutory receipt only operates when the whole of the debt secured by the mortgage has been paid. The provisions of sect. 42 are only two alternative modes of revesting the property in the mortgagor, and neither of them precludes the society from going into the question how much is really due on the mortgage. But even if the mortgage is discharged the liability still remains on the shares, and must be determined according to the rules of the society, and that liability is not gone by reason of the receipt: *Fourth City Mutual Benefit Building Society* v. *Williams* (1); *Pease* v. *Jackson* (2); *Sparrow* v. *Farmer* (3). The Plaintiff himself by his pleading claimed to go behind the receipt; and he cannot now set it up in answer to our counter-claim. The decision of the Court below was right on the pleadings; therefore we are, at all events, entitled to the costs of the appeal.

Barber, in reply, as to the costs.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Baron *Pollock* in an action brought by a member of the society who had borrowed money from the society on mortgage. The Plaintiff has paid a certain sum, which has been accepted as the full amount due from him on his mortgages, but he paid part of it under protest. The society gave him a statutory receipt indorsed on his mortgage deeds. The Plaintiff in the action claims repayment of part of the money paid, and the society have counterclaimed for a further sum. The learned Judge in the Court below decided that the Defendants were right on both these points. We have not now to decide on the right of the Plaintiff against the

(1) 14 Ch. D. 140. (2) Law Rep. 3 Ch. 576.
(3) 28 L. J. (Ch.) 537.

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society, as that part of the judgment is not appealed against; but what is said is that under the 42nd section of the *Building Societies Act*, 1874, it is not possible for the society, after having given the statutory receipt, to claim anything more, and we think that contention is correct. The section relied on is as follows:—[His Lordship read the section.] The society adopted the latter of the two alternative methods, that is, they gave a receipt indorsed in the statutory form. We must give effect to the words of the Act, which say that the receipt "shall vacate the mortgage or further charge or debt." It is contended that the alternative form of the clause points to a difference between a mortgage and a debt, and that the latter word only refers to a case where there is no mortgage. But even if it were so it would come to the same thing, for if the mortgage is vacated the debt due on the covenant in the mortgage is also vacated. The society has therefore precluded itself from saying that there is any debt due, even though the receipt was given under a mistake.

The counsel for the Respondents raised two points, the first was that if all the moneys were not in fact paid, the statutory effect of the receipt did not arise. But that is not so; to say that after the indorsement is made the parties were left free to re-open the question as to the amount due would be to repeal the section. The second argument was that two alternative provisions are really only two alternative modes of revesting the property in the mortgagor, but such a contention would strike out part of the second alternative. The receipt has, under the statute, not only the effect of revesting the property, but also of vacating the mortgage, therefore, in my opinion, the receipt precludes the society from saying that anything remains due on the mortgage. Then it is said that the debt on the Plaintiff's original obligation on the shares still remains, though the mortgage is gone; but, in my opinion, it is clear that the mortgage covenant is to cover not only the mortgage money and interest, but all the payments due on the shares, and even if all such payments have not been made, the debt is gone by reason of the indorsement. The case of *Sparrow v. Farmer* (1) was referred to, but when we look at the facts of that case we find that all that was decided there was,

(1) 28 L. J. (Ch.) 537.

that though the mortgage debt was so far gone that the shareholder was able to redeem his property, yet he still remained liable for payments in respect of shares still subsisting. But here all which was payable down to the time when the mortgage was satisfied is covered by the receipt, and there is no claim for payments accrued due since, but for sums due before the mortgage was vacated. Therefore that decision has no bearing on the present case.

With respect to the costs, we think that as the decision of the Court was right on the pleadings then before it, the order as to costs should not be disturbed, and that there should be no costs of the appeal.

BOWEN, L.J.:—

I am of the same opinion, and will only add one word, namely, that I am not quite so confident upon the point as the other members of the Court.

FRY, L.J.:—

I am of the same opinion. The argument of the Respondents would reduce the words of the section to no effect whatever, for a receipt indorsed is *primâ facie* evidence of payment, independently of the statute. It is said that before the receipt can have its statutory effect it must be proved that all moneys due have been paid; but the words "such receipt" seem to be against that construction, and it would be a very inconvenient construction as the effect would be that proof of all the money having been paid would be essential to the title of every estate which had been mortgaged to a building society. Then it was said that though the liability on the mortgage was satisfied, the liability on the shares remained; but all liability on the shares was merged in the mortgage, and as that is vacated the debt is gone also. I agree as to the costs.

Solicitors: *J. J. & C. J. Allen; C. A. Rus.*

M. W.

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Feb. 23, 27;
March 5.

In re LEONARD & ELLIS'S TRADE-MARK. LEONARD & ELLIS *v.* WELLS.

[1883 L. 3096.]

Trade-mark—New Name for New Article—Improper Registration—Injunction "Heading"—Trade-marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10.

L. & E. invented in 1873 a process for making a certain description of lubricating oil which they called "Valvoline," and in that year registered in *America* as their trade-mark, the word accompanied by a device. In August, 1877, they registered the same trade-mark in *England*, and in February, 1878, registered the word "Valvoline" alone as their trade-mark. After this mark had been five years on the register they commenced an action against *W.* to restrain him from selling under the name of Valvoline any oil not made by the Plaintiffs. *W.* moved to rectify the register by striking out the trade-mark "Valvoline." The Court came to the conclusion on the evidence that *L. & E.* had not used "Valvoline" alone as a trade-mark either in *America* or *England* before the passing of the *Trade-marks Registration Act*, 1875, but only in conjunction with a device, and that "Valvoline" was a word invented to describe the particular class of oil at the same time as the process was invented, and was used as a descriptive term for that particular kind of oil. The process was not the subject of a patent:—

Held, that where a person seeks to remove a trade-mark from the register the *onus* is upon him to shew that it ought to be removed, but though his own evidence may be insufficient for the purpose, the *onus* is discharged if it appears from the evidence of the owner of the mark that it ought not to be on the register.

Whether a word used alone as a trade-mark in a foreign country before the passing of the *Trade-marks Act*, 1875, can be registered under the Act if it has not been so used in this country *quære*:—

Held, further, that a single word cannot be registered under the Act, on the ground that it was used as a "heading," unless it was so used before the passing of the Act:

Held, therefore, affirming the decision of *Pearson*, J., that the trade-mark "Valvoline" must be removed from the register.

If a person who invents a process for making a new article invents at the same time a new name for describing such article, and the article comes to be known by that name only, he cannot afterwards, when everybody is at liberty to make that article, claim a monopoly in the name:—

Held, therefore, affirming the decision of *Pearson*, J., that the Defendants were not by using the name "Valvoline," which was the only name by which the substance in question was known, infringing any rights of the Plaintiffs, or representing their goods as made by the Plaintiffs, and that

the fact that the Plaintiffs had in consequence of the registration enjoyed a practical monopoly of the name for five years did not, as the name had been improperly put in the register, give them any better right than they would otherwise have had.

Per Fry, L.J., *semble*, a "special and distinctive" word within the meaning of the Act must be a word intended to distinguish articles manufactured by one person from similar articles manufactured by other persons, and not a word merely descriptive of the articles themselves.

ON the 14th of August, 1877, *Leonard & Ellis* applied to register as a trade-mark applicable to "lubricating oils," the word "Valvoline" printed across a perforated shield or crescent, and it was registered in due course. They claimed to have used it as a trade-mark four years before the 11th of August, 1877, and they had registered it in the *United States* in 1873.

On the 13th of April, 1877, *Horsburgh & Co.* had applied to register a trade-mark consisting of the word "Valvoleum," with a distinctive device of an entirely different character. *Leonard & Ellis* applied under sect. 6 of the *Trade-marks Registration Act*, 1875, to stop the registration, on the ground that the mark was so nearly identical with their trade-mark as to be calculated to deceive.

On the 2nd of February, 1878, Sir *G. Jessel*, M.R., refused this application of *Leonard & Ellis*, saying, that the complainants put on their mark the word "Valvoline," meaning that the article was "valve oil." That the word was a new word, but the only novelty was the "oline," the word valve, which was the essential part, being old. That *Horsburgh & Co.* proposed to register a new device which had not the most remote resemblance to the device of *Leonard & Ellis*, and below this device they put the word "valvoleum," which also meant "valve oil." Both parties therefore represented on their trade-marks that they sold valve oil of their own manufacture, and they were at liberty to do so. That this was in fact an attempt by *Leonard & Ellis* to exclude all the rest of the trade from representing that they sold valve oil. They could have no possible right to restrain any one from using the word valve, and *Horsburgh & Co.* did not use the word "oline" but "oleum," so that the only novelty in the word used by *Leonard & Ellis* was not taken. That the use of the mark proposed to be registered by *Horsburgh & Co.* was not

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deception within the meaning of the Act, and *Leonard & Ellis* could have no right to have it taken off the register unless it was an infringement of their trade-mark, which in his Lordship's opinion it was not.

On the 22nd of February, 1878, *Leonard & Ellis* applied to register the word "Valvoline," without any device, as their trade-mark, alleging that they had used it for five years before the 6th of March, 1878, and this mark was registered in due course.

In 1883, this mark having been five years on the register, *Leonard & Ellis* commenced their action against *Wells & Co.* for an injunction to restrain the Defendants from infringing the last-mentioned trade-mark, and from selling, offering for sale, or in any way representing as valvoline any lubricating oil not made by the Plaintiffs, and gave notice of motion for an injunction. The Defendants replied by a notice of motion to rectify the register by striking out the trade-mark consisting of the word "Valvoline" registered by *Leonard & Ellis* in 1878.

Pearson, J., said that the question was, whether in February, 1878, the word "Valvoline" was a word which *Leonard & Ellis* had a right to adopt to the exclusion of its use by others of Her Majesty's subjects, or whether it had not by that time become, even if it was not originally, a merely descriptive word equivalent to "valve oil." His Lordship was of opinion, on the evidence, that from 1873 to 1878 the word had been used by the Plaintiffs themselves as a word of description and not as a trade-mark, for that (1), the word meant nothing but valve oil; (2), that when they wished to have a trade-mark in *America* they did not register "Valvoline" only, but the word accompanied by a device; (3), that in 1877 they registered the word in *England*, not alone, but with the accompanying device, and it was not till after the decision in the *Horsburgh Case* that they registered the word alone. His Lordship was satisfied on the evidence that till 1878 they had never used "Valvoline" as their trade-mark, and declined to allow them to adduce fresh evidence for the purpose of shewing that they had done so. He therefore made an order for expunging the trade-mark "Valvoline" from the register, and refused the injunction. *Leonard & Ellis* appealed from both orders, and on the appeal from the refusal of the injunction, they

adduced further evidence to shew that they had used "Valvoline" alone as a trade-mark before 1875.

The Court of Appeal came to the conclusion, on the evidence, that the word had not been used alone as a trade-mark in *England* before the passing of the *Trade-marks Registration Act*, and that it was not satisfactorily shewn that it had been so used in *America*. Their Lordships also considered it to be established that the word "Valvoline" had been invented as the name for a particular kind of lubricating oil at the same time as the process by which it was made, and that *Leonard & Ellis* themselves had treated it as a word descriptive of the substance, viz., a particular kind of lubricating oil which any one was at liberty to make, and not as a trade-mark. *Wells & Co.* did not use the word in a way calculated to represent their goods as made by the Plaintiffs.

The appeal from the final order to remove the trade-mark from the register was heard on the 23rd and 27th of February and the 1st of March, 1884. The Appellants applied for leave to adduce further evidence as to the use of the word "Valvoline" alone as a trade-mark before 1875.

Aston, Q.C., and *Willis Bund*, for the Appellants:—

The evidence shews that the word was used as a trade-mark before 1875. It was not a descriptive word, but a fancy name, and as such capable of being used as a trade-mark. We had two trade-marks, the word with the perforated shield, and the word alone. The word was a distinctive heading within sect. 10, and good as a trade-mark under that section even if not used before the passing of the Act. The *onus* to prove that the mark was not capable of being registered is on the other side, and their evidence totally fails to prove it. The word had never become a common mark, as in *In re Hyde & Co.'s Trade-mark* (1).

Feb. 27. *Cozens-Hardy*, Q.C., and *H. Greenwood, contrà*:—

The question is whether "Valvoline" is a trade-mark? If not, we can have it removed from the register. A word cannot be a trade-mark unless it was used as such before the passing of the Act. Now was it so used? *Leonard & Ellis* in their

(1) 7 Ch. D. 724.

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affidavits repeatedly speak of the word as "part of their trade-mark," and they opposed *Horsburgh's* application on the ground that "Valvoleum" was very similar to "Valvoline," which they alleged to be an essential part of their trade-mark. That is not enough, the word must have been used alone as a trade-mark: *In re Palmer's Trade-mark* (1), and the evidence shews that it was not used alone. Again, the question has to be considered whether it is not the only name descriptive of a particular article, in which case every person who can make the article may sell it under that name: *In re Palmer's Trade-mark*; *Linoleum Manufacturing Company* v. *Nairn* (2). The result of the evidence is that "Valvoline" is the name descriptive of a particular kind of oil which has no other name, and there is no dispute that we may manufacture it. If so, we may sell it under that name so long as we do nothing to lead persons to believe that the article we sell is manufactured by *Leonard & Ellis*. They cannot therefore have any right to the word as a trade-mark.

Aston, in reply:—

The balance of evidence proves that "Valvoline" was used as a fancy name, or a trade-mark before 1875. "Oline" has no meaning in itself, as in "crinoline."

[*Cotton*, L.J., suggested "butterine."]

No one called lubricating oil "Valvoline," except the Plaintiffs.

In 1877 the word "Valvoline" was such a word as might be legally registered as a trade-mark. You may register a word not used before 1875, in combination with a mark. And you may register a word alone if used before 1875; and we contend you may register a word, even though not used before 1875, if it is used as a heading.

EARL OF SELBORNE, L.C.:—

We thought it right to hear this final appeal on the same evidence as was before the Court below. But, having regard to the fact that both motions were heard together before the Judge of the Court below, we think it better to hear the appeal on the

(1) 24 Ch. D. 504. (2) 7 Ch. D. 834.

interlocutory application now, and then to consider whether fresh evidence should be allowed on the other appeal.

March 5, 1884. *Aston*, Q.C., and *Willis Bund*, for the Plaintiffs on the appeal from the order refusing the injunction:—

The new evidence shews that the word "Valvoline" was used as a trade-mark before 1875. The Plaintiffs have been on the register for that word for upwards of five years, and have had the exclusive use of it during that period. "Valvoline" has therefore necessarily become known to the trade as a substance manufactured by us, and the Defendants are, by using it, representing their goods as our manufacture: *The Collins Company* v. *Brown* (1).

Cozens-Hardy, Q.C., and *H. Greenwood, contrà*, were not called upon.

EARL OF SELBORNE, L.C.:—

We think that there are not sufficient grounds shewn to disturb the orders which have been made by the learned Judge below. It will be convenient first to deal with the question of the right of Messrs. *Leonard & Ellis* to remain registered for the word "Valvoline," standing alone, as a trade-mark, because, if they have that right the other question does not arise; for the circular issued by the Defendants would, beyond all doubt, be an infringement of the trade-mark.

Some points of law which were determined by this Court in the case of *In re Palmer's Trade-mark* (2) are very material with respect to the application to remove the word "Valvoline," standing alone, from the register of trade-marks. It was determined in that case, upon the construction of the 3rd and 5th sections of the Act, that the 3rd section, making the registry of a trade-mark *primâ facie* evidence, and the continuance of the registration for five years conclusive evidence of the right of the registered proprietor to the exclusive use of that trade-mark, subject to the provisions of the Act, does not control, and has no bearing upon the right of anyone who holds himself aggrieved by

(1) 3 K. & J. 423. (2) 21 Ch. D. 47.

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any improper registration to apply under the 5th section for the removal from the register of the alleged trade-mark which he says has been improperly registered.

That being so, as it seems to me, the 3rd section is entirely out of the case. If five years' registration is not conclusive evidence, then the being on the register is for this purpose *per se* no evidence at all; because that which in less than five years is *primâ facie* evidence is after the five years conclusive evidence. But it has been held that in a case of this nature registration for five years is not conclusive. Consequently we have nothing to do here with the 3rd section; but, of course, anyone who makes an application to take a registered mark off the register under the 5th section has upon him the burden of proving that it ought to be taken off. If he takes the ground which in this case is taken, that the mark registered as a trade-mark is one of a description not authorized to be so registered, still some burden of proof, in my opinion, lies upon him. When a mark is registered it is not to be assumed against the registered person that it was not within the terms of the 10th section of the Act, which defines what marks are authorized to be "registered;" and, notwithstanding the general rule that no man is bound to prove a negative, I am disposed to think that the person applying to have it removed must shew some ground for putting on the party who has registered the duty of making out his right to retain it on the register. But in this case the matter has been fairly brought into controversy on both sides. Both sides have gone into evidence, and that being so we must look at the result of the evidence as a whole.

The 10th section enacts that "For the purposes of this Act a trade-mark consists of one or more of the following essential particulars." I pass over the first two, upon which no question has arisen. The third is "a distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures;" and then also, "any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this Act, may be registered as such under this Act." Mr. *Aston* suggested that the words in the

sentence which I have read, "before the passing of this Act," were not applicable to what he described as a heading, and I suppose he meant to suggest that upon the evidence there was sufficient proof that "Valvoline" was used as a heading. I am satisfied that the opinion which was given by one of my learned Brothers, if not by the whole Court, in *In re Palmer's Trade-mark* (1), is perfectly correct, that the definition "any special and distinctive word or words used as a trade-mark before the passing of this Act" refers to words when used alone, not in combination with any other device. Now to say that a word used alone, not in combination with any other device, if it was used as a heading, is discharged by the prior portion of the section from the condition that it must have been so used before the passing of this Act, is to strike out of the Act those words of condition, and indeed the whole of the clause which contains them; because whatever is said of a heading is said of any distinctive device, any distinctive mark, any distinctive label, or any distinctive ticket. The result therefore would be that in every case the condition "before the passing of this Act" would be got rid of as to a name or a word; so anything else which has been used as a device or as a mark, or as a label, or as a ticket.

Now, as to the word "Valvoline," I for my part am not disposed to doubt, that if that word had been used in the *United Kingdom* as a "trade-mark" before the passing of the Act, it might have been registered under the Act. It is said that, in *Horsburgh's* case, the late Master of the Rolls spoke of the word as if it belonged to the ordinary English language, and was merely the equivalent of "Valve-oil." I suspect, however, that his Lordship used the language referred to rather with reference to the word "Valve," which was the common element of "Valvoline," and "Valvoleum," than for a purpose which would justify the argument founded upon it here, that the word was not one capable of registration. To me, I confess, it seems that the inventor of that word was at liberty to use it as a trade-mark. But then the question is, whether upon the evidence before the learned Judge below, there was any proof of his having so used it. [His Lordship then referred to the evidence before the Court below, and to the

(1) 24 Ch. D. 504, 518.

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evidence subsequently introduced on the interlocutory appeal, and stated the conclusion at which the Court had arrived to be, that there had been no use as a trade-mark of the word "Valvoline" alone in this country before the passing of the Act of 1875.] It has been suggested this morning by Mr. *Aston* that the use of it even in the *United States* might be enough to satisfy the words of the Act. I do not feel obliged to express any conclusive opinion upon that question, because I am also of opinion that there was not, and I may say, even now upon the interlocutory application there is not, any evidence satisfactory to my mind that the word "Valvoline" had ever been used alone as a trade-mark, even in the *United States*, before 1875. What is the meaning of "used as a trade-mark," as distinguished from the use of the words to describe an article. I do not at all mean to say that it is impossible that a word which is used to describe an article, may also, if the proper means are taken at the proper time, be used as a trade-mark; but when any such double use takes place, it is most important to remember the difference between the use of a name as a trade-mark and the use of it as a descriptive term. If the article itself is *publici juris*, and anybody may make it, then people who make it are at liberty, provided they do so honestly, to describe it by the descriptive term by which it is properly known in the trade, and no right of monopoly to that descriptive term can be acquired otherwise than by using it as a trade-mark. If it is used as a trade-mark, then it is that use and not the other use which may be restrained. I think I may, without impropriety, though referring to words used by myself, illustrate the distinction to which I am now alluding by the case of the *Singer Manufacturing Company* v. *Loog* (1). There both questions arose. There was a label which was not an infringement of the plaintiffs' trade-mark in any other way than that it introduced the word "*Singer*," which was upon the plaintiffs' trade-mark. The context was different, but there was nothing which specially belonged to the plaintiffs, either in the form of the label or in the article manufactured, although it resembled as nearly as possible what the plaintiffs manufactured. This Court held that the use of the label introducing the word

(1) 8 App. Cas. 15.

"*Singer*," which was the most distinctive word in the plaintiffs' label, was improper, and an injunction restraining the defendants from the use of it was granted, and in the House of Lords entire concurrence in that part of the judgment of this Court was expressed by all the Lords who delivered their opinions. But the plaintiffs went on in the same action to seek to restrain any use whatever by the defendants of the word "*Singer*" in connection with sewing machines, saying that they had an exclusive right to the use of the word *quocunque modo*, and not merely as part of their brand, or mark, or label. Both this Court and the House of Lords differed from that view, and having before them certain circulars, price lists, advertisements, and other documents in which the defendants had largely used the word "*Singer*," but at the same time had used it in such a way that there was no tendency to represent the manufacture as the plaintiffs' manufacture, unless the plaintiffs had an exclusive right to the use of the word "*Singer*" in any way, both this Court and the House of Lords declined to interfere with the use of the word "*Singer*" by the defendants. What I myself said (I believe with the concurrence of the other Lords in the case) I may here repeat, because it appears to me accurately to express the principle on which the descriptive use of the word is to be distinguished from the use of it as a trade-mark: "It was argued," I said (1), "that the plaintiffs' trading under Mr. *Singer's* name and using his trade-mark, had acquired such a right of property in that name as to entitle them to restrain any rival in trade from introducing it into any of his price lists, circulars, or advertisements, even in such a way as might exclude the possibility of its being understood to represent, directly or indirectly, that the goods sold by him were manufactured by the plaintiffs, or that his trade or business was identical or connected with the trade or business of the plaintiffs. For that argument no authority was cited; and it cannot, in my opinion, be maintained on any principle. The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right, under colour of the former, to invade the latter, neither have the plaintiffs any

(1) 8 App. Cas. 26.

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right under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has, and it is not denied that he has, a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct, and unequivocal way." It is necessary, therefore, in order to bring this case under the 10th section of the Act, to shew some use of the term, not as a descriptive term, but as a trade-mark, and no such use has been shewn. The question, therefore, does not arise whether, if it were used in both ways the one would be prejudiced by the other.

Now, what is the effect of the evidence? I will refer first to what was before the late Master of the Rolls in *Horsburgh's Case.* [His Lordship entered into an examination of the evidence used on that occasion, and stated the result to be that on that occasion Mr. *Ellis* and his witnesses in express terms stated the word "Valvoline" to be a word descriptive of a peculiar kind of oil made by *Leonard & Ellis.*] That was in substance the whole of the evidence that was before Mr. Justice *Pearson* upon the question of registry—that the word was a descriptive word, descriptive of a peculiar class of oils. It appears to me that this was not enough to make it capable of being registered under the 10th section. It does not shew that the word was used as a trade-mark, but shews something different. The evidence before Mr. Justice *Pearson* was the same upon the question of injunction. and upon that evidence I am of opinion that he came to a correct conclusion.

But we have now before us the question upon the injunction on new evidence, and I am sorry to say that some portions of that evidence at least look like a direct contradiction in terms of what had been stated by Mr. *Ellis's* witnesses, and particularly by Mr. *Ellis* in the former evidence, for whereas in a former affidavit he had distinctly said that the word "Valvoline" was descriptive of a peculiar class of oils, in the new affidavit he says it is not descriptive. We must, however, look at the evidence as a whole. [His Lordship then entered into an elaborate

examination of the evidence, including the document circulated by Messrs. *Leonard & Ellis*, and proceeded as follows :—]

The conclusion to which, in my mind, the evidence irresistibly leads, is that the word "Valvoline" has been used by the Plaintiffs not only as a descriptive term, but as a descriptive term of a thing which the Plaintiffs desire the public to suppose that nobody else does make or can make. By "can make" I do not mean that they claim an exclusive right to make it, but represent themselves to be, as has been said in many cases, exclusively in possession of the manufacture. It is clear upon the evidence that that is not so. The articles which are manufactured are *publici juris*, and so long as the word "Valvoline" is not used in such a manner as to represent that the article sold under that name is manufactured by the Plaintiffs or by persons identified in business with the Plaintiffs, it seems to me that the use of it cannot be restrained.

The embarrassment which I have during a portion of this case felt has arisen from the following considerations. The word "Valvoline," is used in the Plaintiffs' trade-mark, though in combination, and if there were not this mass of evidence to shew that it is a descriptive term, I should have had very little difficulty upon the principle of well-known authorities in holding that it could not have been taken out of that trade-mark of which it is a prominent part and used as a trade-mark alone without infringing the Plaintiffs' right. But if the word is used by the Defendants, not as a trade-mark, but in circulars, advertisements, and so on, as a descriptive word, it being found that it is a descriptive word, and descriptive of a thing which anybody may make and which anybody may sell, then it appears to me that the burden is upon the Plaintiffs to shew that it is so used in those circulars and advertisements as in effect to represent, or to have a tendency to make people suppose, that the thing advertised or mentioned in the circulars is the manufacture of the Plaintiffs. Here, again, a little embarrassment arises from the fact that since 1878 the word has actually been registered as the Plaintiffs' trade-mark, and consequently has been in a certain sense *de facto* the Plaintiffs' trade-mark. But if the Plaintiffs had no right to the registration, ought they to have any benefit from the fact of registration? If the registration is to be

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annulled, can they have established substantially the same right by the degree of exclusiveness in the use of the word which they practically got by the unauthorized registration. According to the best judgment I can form on that point, after fully considering it, I think that they ought to have no benefit from it, and therefore that the question must be considered apart from the fact that they had during that period of time obtained an apparent monopoly of the word by the unauthorized registration of it as a trade-mark.

That brings us to the last point which we have to consider. Is this document issued by the Defendants a document which, considered on the principles properly applicable to such cases, so uses the word "Valvoline" which is a prominent part of the Plaintiffs' trade-mark, as to represent in effect, or to have a tendency to lead careless persons into whose hands the document might come to suppose, that the article is the Plaintiffs' manufacture, putting aside the enjoyment which the Plaintiffs had of the name by reason of its having been on the register ever since 1878? I think not. The word "Valvoline" is here used clearly not as a trade-mark, but as a sort of heading, or title, or label, or prominent word descriptive of the article, and the names "*M. Wells & Co.*, Oil Refiners and Importers," with their proper address, are placed upon the document with as much prominence as the word "Valvoline," so that anyone looking even casually at the document, and only attending to that which is most conspicuous in it, if he saw the name "Valvoline," would see the words "*M. Wells & Co.*" If you add to this that a person who would understand anything by the word "Valvoline," must know something about the trade and the use of the word in the trade, I am brought to the conclusion that there is not enough upon that label to shew that anyone would be liable to be misled by it into supposing that the article was the Plaintiffs' manufacture.

Therefore upon the injunction, also, I think the learned Judge was right.

COTTON, L.J.:—

There are two appeals here before us, and the first to be considered is the appeal from the decision of Mr. Justice *Pearson* that the word "Valvoline," which has been registered alone as a

trade-mark, ought to be taken off the register. Now I think it unnecessary to repeat what I said in the case of *In re Palmer's Trade-Mark* (1) shewing my reasons for holding that in order to enable a special or distinctive word to be registered as a trade-mark it must appear that it has been used alone as a trade-mark before the passing of the Act, and that it is not sufficient to shew that the word attempted to be registered as a trade-mark under the Act was used as part only of a trade-mark which was in use before the Act came into operation. Then comes the question whether it is shewn that the word here in question was used alone as a trade-mark before the Act. Now my opinion is that when anyone alleging himself to be aggrieved by a registration of a trade-mark comes either before or after the five years, the burden of proof is on him (if the word was one capable of being used before the Act as a trade-mark) to shew that in fact it was not so used, and I consider that the Respondents on this appeal who applied to Mr. Justice *Pearson* to remove the trade-mark "Valvoline," had this burden thrown upon them.

There are then two questions to be considered; first, was the word "Valvoline" of itself one which could be registered as a trade-mark? and, secondly, whether before the Act it was used as a trade-mark. In the absence of evidence I should have looked upon it as a mere fancy name, and therefore capable of being used before the Act as a trade-mark; but having regard to what I think is the effect of the evidence, I do not intend to bind myself by any opinion as to whether the word in question in the present case could be used as a trade-mark. I say so for this reason, that there is a good deal of evidence to shew that this was a word invented at the same time as the process under which the article was manufactured, and was invented for the purpose of describing that special class of oil which was manufactured by that new process. Now, in my opinion, when a man invents a new article, and invents a word as descriptive of that article, then if all the world are at liberty to make that article he stands in a very great difficulty as regards claiming to himself the exclusive use of that name which he has invented to describe the article. It is not, however, necessary to give an opinion upon that

(1) 24 Ch. D. 504.

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question, because, in my opinion, the proper conclusion from the evidence before Mr. Justice *Pearson* was that even if the word "Valvoline" alone was capable of being used as a trade-mark it had not been so used before the passing of the Act. In my opinion the burden was upon Messrs. *Wells*, who applied to Mr. Justice *Pearson*, to remove the mark from the register to shew that it was not so used. It was urged that there was nothing on their evidence to satisfy the Court that the word "Valvoline" was not used as a trade-mark before the passing of the Act. That may be so, I rather think that it is. But, as Messrs. *Leonard & Ellis*, not choosing to rely on the absence of sufficient evidence on the part of Messrs. *Wells*, entered into evidence of their own, we must, when the case comes before us, not have regard to the source whence the evidence comes, but to what is the effect of the evidence that is before the Court, and, in my opinion, the effect of the whole evidence is that "Valvoline" had been used before 1875, but only as part of that which *Leonard & Ellis* registered as their entire trade-mark in the *United States* in the year 1873, being the very year in which they invented this process of manufacture, and invented the name to describe the article produced by it.

I think that the appeal as regards the registration ought to be dealt with only on the evidence that was before Mr. Justice *Pearson*, because, in my opinion, it is most dangerous to allow parties, when they have taken their stand at the trial of a particular question on certain evidence relying either on the sufficiency of their own or the deficiency of their opponent's evidence, afterwards to come, when they find that they have miscalculated the effect of it, and ask to be allowed to produce evidence which they think will meet the point of the case. I shall therefore deal with this part of the case only, on the evidence before Mr. Justice *Pearson*, though I quite agree with the Lord Chancellor that if we are to look at the subsequent evidence filed on the other appeal, there is nothing to alter the opinion which I had formed on the evidence which was before Mr. Justice *Pearson*. That subsequent evidence only strengthens the great dislike which I have to allow evidence to be adduced after there has been a trial in order to cover a blot which has been pointed

out by the result of that trial. In my opinion, therefore, the order made for removing this trade-mark "Valvoline" was right.

Then we come to the motion for the injunction, and I must not be supposed to say that the use by a person of part of a trade-mark may not be such an act as to enable the registered proprietor of the trade-mark to get an injunction on the well-known principle that although the actual trade-mark itself is not used, yet part of it—and an important part of it—may be so used as to be the means of deceiving the public by representing things which are not, in fact, the plaintiff's goods as the plaintiff's goods.

We must then consider whether or no "Valvoline" here is so used by the Defendants as to be calculated to mislead, so as to induce incautious persons buying their goods to consider them as the goods of the Plaintiffs, and in my opinion it would not be a proper conclusion on the evidence to hold that purchasers would be so misled. There is a great deal, not only in the affidavits, but more particularly in the printed documents which have been put in by the Plaintiffs, to shew that "Valvoline" was really a name used in order to describe, not the goods of the Plaintiffs as distinguished from the same goods made by anyone else, but to distinguish oil prepared by a certain new process first introduced or first used in 1873 by the Plaintiffs. As that is so, in my opinion, the use by the Defendants of this term "Valvoline" on their circulars cannot properly be said to be calculated to deceive the public or purchasers into a belief that what they are selling under the name of "Valvoline" is a manufacture not of their own but of the Plaintiffs. One difficulty undoubtedly is that which has been adverted to by the Lord Chancellor, that during a certain period "Valvoline" was on the register as the Plaintiffs' trade-mark, and, therefore, no one else could use it as describing this particular class of oil. But we have held that it was improperly put on the register. Now, if a man has a patent, and during the term of his patent is the only maker of an article to which he gives a particular name, which name during the continuance of the patent comes to be merely a description of the article, he cannot, in my opinion, after his patent is gone, and the making of the article is free and open

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to all the world, claim the name as his trade-mark. Therefore, even if since the registration of the trade-mark "Valvoline" and when it was registered no one else has for the same oil used this term "Valvoline," that does not now, when a protection improperly obtained by the Plaintiffs under the Act is removed and taken out of the way, enable them to say that the use of that word on a circular card, not so framed as in any way to imitate or represent that of the Plaintiffs, is to be restrained as deceiving the public.

In my opinion, therefore, both the appeals must be dismissed.

FRY, L.J.:—

The first question arises on the application of Messrs. *Wells & Co.* to remove the second trade-mark of the Respondents, Messrs. *Leonard & Ellis*, from the register. The question turns upon those words of the 10th section which the Lord Chancellor has read. The applicants have, in my judgment, taken upon themselves to discharge the burden of shewing that the word "Valvoline," assuming it to be capable of being used as a trade-mark, was not so used before the passing of this Act. I am of opinion that it is shewn that it was not so used either in this country or in the *United States*, and it is, therefore, not necessary to express any opinion as to whether the user must have been in this country; but I am by no means satisfied that a user abroad would be sufficient.

A second point has arisen upon the words referred to which also requires consideration. Was the word "Valvoline" a special and distinctive word within the meaning of sect. 10?

When a new material is invented, and at the same time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section. It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker. I am inclined to think that the words "special and distinctive" import the specializing of the make and manufacture of a particular maker from all other manufacturers, and distinguishing the manufacture of one person from the

manufacture of all others. It is not necessary, however, to decide the point, for the applicants succeed by shewing that the word in question was not used as a trade-mark before the passing of the Act. As regards the argument that a single word used as a heading might be registered as being a "heading" within the meaning of the earlier part of the clause, I adopt entirely the view of the Lord Chancellor that the argument would neutralize the words relating to user before the passing of the Act.

Then, upon the application for an injunction, the real question is this: "Are the Defendants selling their manufacture as and for the manufacture of the Plaintiffs?" Now, if the word "Valvoline" had come to mean that the article so designated was manufactured by the Plaintiffs, they *primâ facie* would have been entitled to an injunction. No doubt the fact that from 1878 downwards the Plaintiffs had the word "Valvoline" registered as their trade-mark tends in that direction, but it must be borne in mind that concurrently with the use of their registered mark they were issuing papers which, in my judgment, distinctly represent "Valvoline" as meaning not oil made by the Plaintiffs, but a particular kind of oil. If that be so, and the Defendants are at liberty to manufacture that kind of oil, I think they are equally at liberty to call it by the name it has got on the market, viz., "Valvoline."

Solicitors for *Leonard & Ellis: Paddison, Son, & Co.*
Solicitors for *Wells & Co.: H. B. Clarke & Son.*

H. C. J.

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PEARSON, J.
March 7.
C. A.
March 12.

HERMANN LOOG *v.* BEAN.

[1884 L. 937.]

Injunction—Oral Slander—Mandatory Injunction—Letters addressed to Agent at the Principal's Office.

B. was employed to manage one of *L.'s* branch offices for the sale of machines, and resided on the premises. He was dismissed by *L.*, and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at *L.'s* branch office. He admitted that among the letters so forwarded to him were two which related to *L.'s* business, and that he did not hand them to *L.*, but returned them to the senders. After his dismissal he went about among the customers, making oral statements reflecting on the solvency of *L.*, and advised some of them not to pay *L.* for machines which had been supplied through himself. *L.* brought an action to restrain *B.* from making statements to the customers or any other person or persons that *L.* was about to stop payment, or was in difficulties or insolvent, and from in any manner slandering *L.* or injuring his reputation or business, and from giving notice to the post-office to forward to *B.'s* residence letters addressed to him at *L.'s* office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—

Held, by *Pearson*, J., and the Court of Appeal, that the Court has jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, and that this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statements; and that in the present case an injunction ought to be granted:

Held, also, by *Pearson*, J., and by the Court of Appeal, that the Defendant had no right to give a notice to the post-office the effect of which would be to hand over to him, letters of which it was probable that the greater part related only to *L.'s* business; and that the case was one in which a mandatory injunction compelling the Defendant to withdraw his notice could properly be made, the Plaintiff being put under an undertaking only to open the letters at certain specified times, with liberty for the Defendant to be present at the opening.

THE Plaintiffs were a limited company styled *Hermann Loog, Limited*, carrying on the business of selling and letting sewing machines. In 1882 the Defendant entered their employment as manager of their branch establishment in *Portsea*, at a salary of £2 per week, the engagement being determinable by a week's notice. The terms of the engagement were defined by an agreement in writing, dated the 13th of October, 1882, which, *inter*

alia, provided that "all letters and correspondence, though addressed to the said *E. C. Bean*, unless referring to private affairs, shall be deemed to be the property of the company, and may be opened by any director thereof or any person authorized by the company to do so, and possession thereof shall be taken by the company whenever desired by the officers." The Defendant was to reside on the company's premises, and accordingly did so, and conducted their business there from the date of the agreement.

The company dismissed the Defendant on the 9th of January, 1884, giving him a week's salary in lieu of notice, and on the 12th of February they commenced the present action, asking for an account of the Defendant's transactions as their agent, and for an injunction in nearly the same terms as their notice of motion subsequently given, viz., that the Defendant, his agents, or servants, might be restrained from stating to the Plaintiffs' customers, or any other person or persons, that the Plaintiffs were about to stop payment, or were in difficulties, or insolvent, or making any statements to the above or the like effect, and from in any manner slandering the Plaintiffs or injuring their reputation or business; and also from giving notice to any of the Plaintiffs' customers not to pay the Plaintiffs any moneys due or owing to the Plaintiffs in respect of the hire of machines or otherwise, and from in any manner intermeddling with the Plaintiffs' customers or making use of the knowledge or influence he acquired as the Plaintiffs' agent so as to injure the Plaintiffs or their business; and also from giving notice to the post-office or any other persons requiring the letters addressed to the Defendant at the Plaintiffs' residence, or their office used by him while he acted as the Plaintiffs' agent, to be re-directed and sent to the Defendant, and from in any manner interfering with the Plaintiffs opening and taking possession of such letters other than those relating to the Defendant's private affairs; and for an order that the Defendant should forthwith withdraw the notice which he had already given to the post-office at *Portsea* requiring letters to be re-directed as above-mentioned, and deliver up to the Plaintiffs all letters which had already been so re-directed other than those relating to the Defendant's private affairs.

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As regards the proceedings with the customers, who were chiefly seamstresses or other working people, evidence was given by a number of them, shewing that the Defendant had made such statements as the following: viz., to one, that the Plaintiffs' firm was a swindle, and that he could supply a better machine than the one she had purchased from the Plaintiffs; to another, that she need not pay the Plaintiffs any of the money remaining due for a machine, as it had been supplied by himself; to another, that he need not pay for a machine till the Defendant was settled with in Court; to another, that she need not pay the Plaintiffs any more money for a machine she had hired; to another, that she had better not pay the Plaintiffs any more of the instalments on a machine she had bought, as they were bankrupts; to another, that a machine she had bought from the Plaintiffs would only last three months longer; to another, that he must not pay anybody but the Defendant for a machine he had bought, as it was his property, and that the Defendant was going to stop all his customers from paying any money till he got his account against the Plaintiffs settled; and several other cases of similar statements were deposed to.

As regarded the second branch of the case, it appeared that the Defendant, on leaving the Plaintiffs' service, gave notice to the post-office at *Portsea* to forward to him at his address in the adjoining district of *Landport* all letters addressed to him at the company's place of business. The Defendant stated by his affidavit that, except in two cases, all the letters which had been re-directed to him in pursuance of the notice, referred only to his private affairs, and that he returned these two to the senders, saying that he was no longer connected with the Plaintiffs. He alleged that he was to some extent a partner with the Plaintiffs, as he had brought in certain stock for which he had not been paid, and that an arrear of salary was due to him, but these statements were denied by an affidavit of the Plaintiffs' manager.

A witness for the Plaintiffs deposed that she had on the 2nd of January, 1884, hired a machine from the Defendant as manager of the Plaintiffs' business, and that on or about the 24th of January, thinking that the Defendant was still managing the business, she called on him and asked him to take the machine away.

That he called with a man and took it away, and she paid him 7*s.* for the hire. No notice of this was given by the Defendant to the Plaintiffs till the 21st of February, when he called at their *Portsea* office and tendered the machine with the 7*s.* This was admitted by the Defendant's affidavit. There was also evidence that the Defendant had received letters with money inclosures, and had not for some time handed the money to the Plaintiffs.

On the 7th of March, 1884, the Plaintiffs moved for an injunction as above.

Northmore Lawrence, for the motion:—

The Defendant was dismissed from the Plaintiffs' service upon due notice being served upon him in accordance with the terms of the agreement entered into between the Plaintiffs and Defendant at the time the Defendant was engaged. After leaving us he went about among our customers spreading false reports about the machines and about our business generally, depreciating the articles made by the firm and recommending the purchasers not to pay the sums due to the Plaintiffs. These statements are fully proved by numerous affidavits in support of the motion.

The Defendant has also instructed the post-office authorities to re-direct all the letters addressed to him at our place of business and send them on to his private address at *Landport*.

The agreement entered into by the Defendant when he entered our service, contains a clause that all letters addressed to him, unless relating to his private affairs, shall be deemed the property of the company. We say, therefore, that we have a property in these letters, and have a right to open them. There can be no doubt that in some instances the re-directed letters contained money payments intended for the Plaintiffs, and have not been handed over to us. The Defendant's conduct is therefore such as to cause an injury to our business, and we require the protection of the order now asked for.

Oswald, for the Defendant *Bean*:—

This is an action against the Defendant for slander, in respect of certain expressions alleged to have been used by him, but which he entirely denies. The Plaintiffs cannot have an injunc-

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tion for slander contained in mere expressions used by the Defendant, even if those expressions were proved to have been made use of; and there is no proof here of special damage being caused: *Bullen & Leake's* Precedents of Pleading (1), as to proving special damage; *Underwood* v. *Parks* (2); *Barnes* v. *Holloway* (3); there is no case in which an injunction has ever been granted to restrain a mere statement said to amount to slander.

PEARSON, J.:—

Upon the materials now before me, the only conclusion I can come to is, that this is a case of gross dishonesty on the part of the Defendant. The Defendant having been an agent to the company and having been discharged from their service, has thought it consistent with his duty to go about among the customers of his late employers, and to make all manner of statements about their position and in depreciation of the goods supplied by them, such as are calculated to be injurious to their business. On that part of the case, independently of any other question, there must be an injunction to restrain the Defendant from continuing such proceedings. Then in regard to the letters addressed to the Defendant, at the Plaintiffs' place of business. It appears there is a clause in the agreement entered into between the Plaintiffs and the Defendant that all letters, though addressed to the Defendant, unless referring to his private affairs, should be deemed to be the property of the company, and might be opened by any director or person authorized by the company, and that possession thereof should be taken by the company whenever desired by the officers. Now the Defendant has given directions to the post-office authorities, that all letters addressed to him at the Plaintiffs' place of business are to be re-directed to his private address. This applies to all the letters so addressed to him, and it would be evidently impossible for the authorities of the post-office to distinguish between the letters concerning the business of the firm and those concerning the Defendant's private affairs. I have therefore to consider whether all the letters addressed to the Defendant ought not to go to the company

(1) 3rd Ed. p. 306.

(2) 2 Str. 1200.

(3) 8 T. R. 150.

in the first instance. The terms of the clause in the agreement are that all the letters are to be considered as the property of the company unless referring to the Defendant's private affairs. It is submitted on behalf of the Plaintiffs that it is impossible that any one should know this without inspecting the letters. I agree with this, but for the Defendant it is said, that the meaning of the clause is this: "That only letters which are shewn not to be the Defendant's private letters are to be opened by the company." But in *Sheppard's* Touchstone (1), I find it laid down that in the construction of a deed you are at liberty to transpose the words in a sentence in order to make it sensible; and I find that I have only to transpose the words "may be opened by any director or any person authorized by the company to do so," which are in this sentence, and to put them in before the words "though addressed to the said *E. C. Bean*," and then the sentence is perfectly easy to be understood. And this is evidently what was intended, for otherwise it would be impossible for the Plaintiffs to open any of these letters. I therefore have no difficulty in granting the injunction to restrain the Defendant from giving instructions to the post-office to redirect letters to his private address, but these letters are to be sent to the Plaintiffs' place of business, and they must undertake to forward to the Defendant any letters which they have reason to believe refer to the private affairs of the Defendant.

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The Defendant appealed, and the appeal was heard on the 12th of March, 1884.

Oswald, for the Appellant:—

As regards the letters, the Defendant had a right to direct the postmaster to forward to him all letters addressed to him, and only two have been thus received by him which did not relate to his own private affairs. The injunction as regards the withdrawing the notice is mandatory, and the Court will not grant such an injunction upon interlocutory application except in special cases, though there is jurisdiction to do so: *Bonner* v. *Great Western Railway Company* (2). Then as regards the injunction against

(1) 7th Ed. p. 87. (2) 24 Ch. D. 1.

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making statements to customers and others, there is no case in which the Court has interfered by injunction against oral statements. Oral slander is only fit to be tried before a jury. There is only one case in which the Court has interfered by interlocutory injunction against a written libel, and there is no case in which it has interfered at all to restrain oral statements.

Northmore Lawrence, contrà:—

Thorley's Cattle Food Company v. *Massam* (1) and *Thomas* v. *Williams* (2) shew that the Court will interfere, since the *Judicature Acts*, to restrain the publication of libellous statements calculated to injure a business, and it cannot make any difference in principle whether the statements are written or oral, though, no doubt, more caution is requisite in exercising the jurisdiction in the latter case.

[COTTON, L.J.:—Do you insist on retaining the words "or to any other person or persons?"]

We are satisfied with an injunction applying only to statements to customers.

[COTTON, L.J.:—Then we do not require to hear you further on that branch of the injunction.]

Then as to the notice to the postmaster, it is in evidence that the Defendant received letters concerning money intended for the Plaintiffs, and gave them no notice of it till after this action had been commenced. He admits having received two letters which belonged to the Plaintiffs and not having forwarded them to the Plaintiffs. There can be no doubt that he received other letters; he managed a considerable business for us, and that all the letters addressed to him at our office, since his dismissal, except two, related only to his private affairs, is too incredible a statement to be believed on his unsupported testimony. *Stapleton* v. *Foreign Vineyard Association* (3) shews how the opening of letters under circumstances like those of the present case may be provided for. The case is not one to which the considerations which ordinarily weigh with the Court against granting a mandatory injunction on motion are applicable.

(1) 14 Ch. D. 763. (2) 14 Ch. D. 864.
(3) 12 W. R. 976.

COTTON, L.J. :—

This is an appeal from an interlocutory injunction granted by Mr. Justice *Pearson*, against the Defendant, who had formerly been in the employ of the Plaintiffs, and whose engagement was put an end to in the beginning of January last. The injunction went to two points—first, to restrain the Defendant from making certain libellous statements with reference to the trade and business of the Plaintiffs. The order has not yet been drawn up; and, therefore, we do not know the exact terms of it, but the indorsement of Mr. *Northmore Lawrence's* brief which has been handed up to us, is: to restain the Defendant, his agents and servants, from stating to the Plaintiffs' customers, or to any other person or persons, that the Plaintiffs are about to stop payment, or are in difficulties, or insolvent, or making any statements to the above or the like effect, and from in any manner slandering the Plaintiffs in their business, and also from giving notice to any of the Plaintiffs' customers not to pay the Plaintiffs any money due or owing to the Plaintiffs in respect of the hire of machines or otherwise. The Registrar, who is in Court, tells me that he thinks the words "or any other person or persons" would not have been in the order if it had been drawn up, because in the Registrar's note the only word is "customers." Now with that qualification the order, in my opinion, is clearly right, and it was only because we thought that Mr. *Lawrence* probably would insist upon the insertion of those words, "or any other person or persons," that we asked him whether he objected to their being struck out. It appears from the evidence that statements such as are prohibited by the order were made by the Defendant. Here is a man, who had been in the employ of the Plaintiffs, making to their customers slanderous statements with regard to the business of the company, and trying to induce the customers not to pay the sums which they owe to the Plaintiffs. The Court has of late granted injunctions in cases of libel, and why should it not also do so in cases of slander? It is clear that slanderous statements such as were made to old customers in this case must have a tendency materially to injure the Plaintiffs' business; they are slanders, therefore, spoken against their trade. It is not necessary, therefore, in my opinion, to shew that loss has actually been

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incurred in consequence of them. If they are calculated to do injury to the trade the Plaintiffs may clearly come to the Court. There is, no doubt, more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what is said. But when the Defendant is proved to have made certain definite statements, such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. The Defendant, though no doubt the tongue is an unruly member to govern, must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering.

Then the second part of the injunction, which is in part mandatory, restrains the Defendant from giving instructions to the postmaster as to his letters, and orders him to withdraw a notice that he has already given to the postmaster. Objection is taken to that on the ground that it is a mandatory injunction, and that the Defendant had a right to give directions to the postmaster to send his letters to his actual address. I need hardly say anything about the mandatory injunction being granted. This Court, when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose. Then as to the merits, undoubtedly a man when he changes his address has a right to give directions to a postmaster to send on to him his letters, but that assumes that they are his letters, and what we find here is that the Defendant was formerly residing at the Plaintiffs' office as a servant of the Plaintiffs, and a very large proportion of the letters addressed to him were undoubtedly letters relating to the business of the company, though of course there might be some letters which would be marked "private." By means of his notice to the postmaster the Defendant has got at least some letters which ought to have been treated as the letters of the Plaintiffs, and to have been sent on to them. Instead of doing that the Defendant has opened them, and not until some time afterwards has he given them to the Plaintiffs, or offered to them the money intended for them, which was in the letters. There is also a case where money was paid to the

Defendant for the hire of a sewing machine of the Plaintiffs and the machine was returned, and he did not for some considerable time send the money or the sewing machine to the Plaintiffs. The Defendant having so acted, the case is in my opinion one in which it is the duty of the Court to interfere, and to see that he does not, by reason of his having been employed in the Plaintiffs' house of business, obtain letters which are intended for them, and really belong to them, but which have come, under his direction given to the postmaster, to his own private residence. Some of them, in consequence of their being forwarded to him at his own house, have admittedly not gone as they ought to have gone, to the address of those persons who had been his employers. I do not rely in any way on the terms of the agreement, because that was an agreement which was to last during the engagement, which engagement has now been put an end to, but we ought, in my opinion, to interfere, and I think the proper order will be to continue the injunction as regards the Defendant's notice to the post-office, on the condition that the Plaintiffs must undertake, in addition to the undertaking they have already given, not to open the letters which are addressed to him at their office except at two hours in the day, in the morning and afternoon, when the post comes in, and that the Defendant shall have liberty at those hours to attend there; and also that they must undertake to deliver to him, instead of forwarding to him, any letters which relate to his private business.

Then comes the question of costs. In my opinion, the Defendant here has failed; and although we have slightly modified the order as it comes before us, yet I think that ought not to prevent the Appellant, who in substance has failed, from paying the costs of the appeal.

BOWEN, L.J.:—

I am of the same opinion. The Appellant complains of this interlocutory injunction in both its parts, and I will take them one after the other.

The first part of the injunction restrains the Defendant from making or publishing any slanderous statements about the Plaintiff company or their business. Now has the Court jurisdic-

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tion to grant such an injunction? It seems to me to be clear that it has. There is a wrong done which is actionable if it has been committed, and which naturally would, if repeated or persisted in, affect injuriously the property or trade of the Plaintiff company. It has been held since the *Judicature Act*, that a plaintiff is entitled to the protection of the Court against a wrong of that sort which is contained in a written document; that is to say, the Court will restrain the publication of a libel which is immediately calculated to injure the property and trade of the person against whom it is directed. Then can there be any distinction in principle between a slander which is contained in a written document and a slander which is not? In the cases of *Thorley's Cattle Food Company* v. *Massam* (1) and *Thomas* v. *Williams* (2) the Court interfered to restrain the slander which was placed upon paper; so that clearly in the case of such written slander as is naturally attended with injury to property and business, the Court has jurisdiction to interfere, and it appears to me that the same principle must apply to spoken slander.

Then I come next to the question about the notice to the postmaster. The Defendant changes his address from the Plaintiff company's office to a private residence, and sends to the postmaster a notice that all letters addressed to him at the Plaintiffs' office are to follow him to his own residence. Now a man has a right when he changes his address to tell the postmaster to send his own letters after him, but it is obvious that he has no right to tell the postmaster to send somebody else's letters after him. The question here is whether the Defendant has not done something more than tell the postmaster to send his own letters after him—his letters relating to his own private business, and I think he has; because letters addressed to an agent at the office of his principal are frequently addressed to him as a servant, though there may of course be among them private letters which belong in law to him. There may be signs which will shew whether the letters belong to the servant or to his master, for instance, words written on the envelope. But the servant has no right, merely because letters are addressed to him, to say that they are his own, if there is nothing on the envelopes to shew that

(1) 14 Ch. D. 763. (2) 14 Ch. D. 864.

they are his own and not his employer's letters. Therefore his notice to the postmaster is clearly too large, because all the letters which are addressed to him at his place of business do not belong to him. That is obvious in principle, and is shewn to be true in fact, because he has actually had letters sent on to him which do not belong to him. I think, therefore, the injunction in that respect is right. I do not in the least rely upon *Stapleton* v. *Foreign Vineyard Association* (1)—which indeed is not in point—but it seems to suggest a *modus vivendi* in this case, which is that the letters should be opened by those persons to whose premises they are addressed, but in the presence of the Appellant, and that they should be handed over to him if they appear to relate to his own private affairs.

FRY, L.J.:—

I am of the same opinion. It must not be taken that by our omitting the words, "any other person or persons" we decide that the Court can only grant an injunction with regard to customers. If Mr. *Lawrence* had insisted upon those words, it would have been necessary to decide whether they could be inserted, but as he did not, it is unnecessary for us to give any opinion on the point. I conceive that the Court has plainly jurisdiction to grant injunctions against slander as well as against libel; at the same time I am not unconscious of the inconvenience which would result from trying actions of slander on motions to commit. I think that requires careful consideration in any case in which the Court is asked to grant an injunction against slander.

Then with regard to the notice to the postmaster. It seems to me, for the reasons given by Lord Justice *Bowen*, that the notice was too large, and I come to that conclusion from the very simple fact that it has induced the postmaster to send to the Defendant letters which belong to the Plaintiffs. Then the question as to who is to open the letters is undoubtedly one of some considerable difficulty, for this reason, that the Court is averse from interfering with a legal right, except so far as is absolutely necessary; and in the present case the Court would not desire to interfere with the

(1) 12 W. R. 976.

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legal right in the letters. But that right cannot be ascertained until they are opened; they must be opened by somebody, and therefore, the Court has to determine who is to open them. There are many reasons which induce me to think that the Plaintiffs are the proper persons to open them. In the first place the letters are addressed to their place of business, and in the next place there appears to be a presumption *primâ facie* that most of the letters addressed to the Defendant coming there are letters which are addressed to the Defendant on their business; and, lastly, the Defendant has certainly behaved with regard to some of the letters and with regard to his other relations to his former employers in a manner which is not creditable to him, and which as between him and the Plaintiffs renders it more expedient that the opening should be done by them in his presence than by him in their presence. I therefore, entirely agree with the opinion which has been expressed in that respect by their Lordships.

It was arranged that the letters should not be opened, except between half-past nine and half-past ten in the morning, and between five and six in the evening, and that the Defendant should be at liberty to be present at the opening.

Solicitors for Plaintiffs: *Michael Abrahams, Son, & Co.*
Solicitor for Defendant: *A. W. Mills.*

H. C. J.

Ex parte CHAPLIN. *In re* SINCLAIR.

C. A. 1884 *Feb.* 29; *March* 4, 13.

Act of Bankruptcy—Fraudulent Conveyance—Assignment of all Debtor's Property—Intent to defeat or delay Creditors—13 *Eliz. c.* 5 [*Revised Ed. Statutes, vol. i. p.* 627]—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2 (1).

A trader in embarrassed circumstances in July, 1882, assigned substantially the whole of his property (including his stock-in-trade, book debts, and the goodwill of his business) to a single creditor, in consideration (as expressed in the deed) of the release by that creditor of a debt of £3271 then owing to him by the debtor. In fact, at the date of the assignment, only £1370 was due by the assignor to the assignee, and the real consideration was the release by the assignee of that debt, and a secret verbal agreement between him and the assignor that he should undertake the payment of the assignor's debts (either the whole of his debts, or, at any rate, his trade debts). On the same day the assignor entered into a written agreement to manage the business as the servant of the assignee at a weekly salary. The assignee, a few days before the execution of the deed, but after the arrangement between the parties had been come to, paid out some executions for the assignor, and shortly after the execution of the deed he paid an arrear of rent which the assignor owed to his landlord. The business was, after the execution of the deed, carried on by the assignor in his own name, just as it was before, there being nothing to shew that he was not the real, as well as the apparent, owner of it, though he was in fact acting under the directions of the assignee. None of the other creditors knew of the assignment. In March, 1883, the assignor was adjudged a bankrupt. At the date of the bankruptcy nearly all the trade debts due by the assignor at the date of the deed had been paid in the course of the carrying on of the business:—

Held, by *Cotton* and *Bowen*, L.JJ., that the deed was void as against the trustee in the bankruptcy as an act of bankruptcy, its necessary effect being to defeat and delay the assignor's creditors in enforcing their ordinary remedies for the recovery of their debts, and there being no means by which they could compel the fulfilment by the assignee of his agreement to pay their debts:

Held, by *Fry*, L.J., that the deed was void as against the assignor's creditors under the statute 13 Eliz. c. 5:

Held, also, that the assignee was not entitled to payment in full out of the bankrupt's estate of the sums which he had paid under the agreement, but that he could only prove for them in the bankruptcy.

THIS was an appeal from an order made on the 3rd of August, 1883, by Mr. Registrar *Pepys*, acting as Chief Judge in Bank-

(1) *Vide* Bankruptcy Act, 1883, sect. 4, sub-sect. 1 (b).

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ruptcy, by which it was declared that two deeds of assignment, respectively dated the 14th of July, 1882, executed by *Walter Sinclair*, a bankrupt, were fraudulent and void as against the trustee in the bankruptcy.

The bankrupt was a retail silversmith and jeweller, and he carried on his business at 137 *Newington Causeway*. Messrs. *G. Hopper Chaplin* and *A. C. Hopper Chaplin* were wholesale jewellers, who had supplied him with goods. The deeds in question were made between the bankrupt and the Messrs. *Chaplin*.

The first of the two deeds was dated the 14th of July, 1882, and was made between the bankrupt of the one part, and Messrs. *Chaplin* of the other part. It contained the following recitals:—"Whereas the said *W. Sinclair* has for some time past carried on the business of a silversmith in the messuage, shop, and premises, No. 137 *Newington Causeway*, aforesaid. And whereas the said *W. Sinclair* is indebted to the said *G. H. Chaplin* and *A. C. H. Chaplin* in the sum of £3271 2*s.* 10*d.*, and, being unprepared to pay the same, the said *W. Sinclair* hath agreed to sell to the said *G. H. Chaplin* and *A. C. H. Chaplin* all the furniture, stock-in-trade, fixtures, chattels, and effects now being in or about or belonging to the said messuage and premises, and also all book debts now due for the same, and the goodwill of the business of a silversmith, in consideration whereof the said *G. H. Chaplin* and *A. C. H. Chaplin* have agreed to release the said *W. Sinclair* from their said debt in manner hereinafter appearing." And it was thereby witnessed "that, in pursuance of the said agreement, and in consideration of the said sum of £3271 2*s.* 10*d.*, so as aforesaid due from the said *W. Sinclair* to the said *G. H. Chaplin* and *A. C. H. Chaplin*, the said *W. Sinclair* doth hereby sell and assign unto the said *G. H. Chaplin* and *A. C. H. Chaplin* all and singular the furniture, stock-in-trade, fixtures, goods, chattels, and effects, now being in and about and belonging to the said messuage, shop, and premises aforesaid, and also all book debts now due and owing in the said business, and also all the estate and interest of him the said *W. Sinclair* in the goodwill of the said business of a silversmith now carried on upon the said messuage and premises, together with the right at all times hereafter to use the name of

the said *W. Sinclair* in carrying on the same business; To hold the said furniture, fixtures, stock-in-trade, book debts, goodwill, and other the premises hereby assigned, unto the said *G. H. Chaplin* and *A. C. H. Chaplin* absolutely. And these presents further witness that, in further pursuance of the said agreement, and for the consideration aforesaid, the said *G. H. Chaplin* and *A. C. H. Chaplin* do hereby absolutely release and discharge the said *W. Sinclair* of and from the said debt or sum of £3271 2*s.* 10*d.*, so as aforesaid due to them from the said *W. Sinclair*, and all actions, suits, claims, and demands, in respect thereof."

The second deed was dated the same day and was made between the same parties. It contained no recital, and it was thereby witnessed that, in consideration of £50 paid to the bankrupt by the Messrs. *Chaplin* "on the execution hereof," the bankrupt, as beneficial owner, did thereby assign to the Messrs. *Chaplin* the shop and premises in which he carried on his business, to hold to them their executors, administrators, and assigns, for the then unexpired residue of the term for which the premises were held, subject to the payment of the rent reserved by and to the performance of the covenants and conditions contained in the original lease. And the Messrs. *Chaplin* covenanted to pay the rent and to observe and perform the covenants and conditions.

On the same day a written agreement was entered into between the Messrs. *Chaplin* and the bankrupt. This agreement contained a recital that the Messrs. *Chaplin* "are possessed of the business of a silversmith and jeweller now carried on upon the messuage and premises No. 137 *Newington Causeway*, and the said *W. Sinclair* hath agreed to enter the employment of the said *G. H. Chaplin* and *A. C. H. Chaplin* for the purpose of managing the said business as hereinafter mentioned." The agreement provided that the bankrupt should enter the employment of the Messrs. *Chaplin* for the purpose of managing the business, as from the day of the date of the agreement, and should, to the best of his power, endeavour to promote the business. He was to devote his whole time during ordinary business hours to the management of the business, and not to be engaged in any other business or occupation whatever; he was in all respects to comply with any orders and directions that might from time to time be given to

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him by the Messrs. *Chaplin ;* he was not to purchase any goods or give any orders whatever without special directions in writing given to him by the Messrs. *Chaplin ;* and they were to pay him for his services £5 weekly, and also to permit him, during the continuance of the agreement, to reside in the messuage and premises, without paying any rent. It was also provided that the agreement might be determined at any time, by either party, by one week's notice in writing, expiring on any day.

After these deeds were executed the business continued to be carried on as it was before in the name of the bankrupt under the directions of the Messrs. *Chaplin*, but to all outward appearance he was still the owner of it. The banking account of the business was continued in his name. On the 2nd of February, 1883, he filed a liquidation petition, and on the 18th of March, 1883, he was adjudicated a bankrupt. The trustee in the bankruptcy afterwards applied to the Court for an order declaring the two deeds of assignment of the 14th of July, 1882, fraudulent and void as against him.

The evidence shewed that at the time when the deeds were executed the bankrupt was in pecuniary difficulties, and that the deeds comprised substantially the whole of his property. It was also proved that there was a parol agreement between him and the Messrs. *Chaplin*, that they should undertake the payment of his debts, and that this agreement and the release of the debt which he owed to them, formed the real consideration for the deeds. It did not, however, clearly appear whether they were to pay the whole of his debts or only his trade debts. At the date of the deeds the debt which the bankrupt owed to the Messrs. *Chaplin*, amounted to only £1370 7*s.* 3*d.*

One of the Messrs. *Chaplin* deposed that the sum of £3271 2*s.* 10*d.* which was stated in the first deed as the consideration paid, included the debt due to the Messrs. *Chaplin* and all the other liabilities of the bankrupt. On the 4th and 11th of July, 1882, after the arrangement between the bankrupt and the Messrs. *Chaplin* had been entered into, they paid out for him, through their solicitors, executions amounting respectively to £88 14*s.* 7*d.*, and £44 17*s.* 2*d.*, and on the 12th of July they paid a judgment debt of £62 0*s.* 6*d.*, which had been recovered against him.

On the 31st of July, 1882, they, through their solicitors, paid the bankrupt's landlord £211 10s. for rent in arrear. The landlord gave his assent to the assignment of the lease to the Messrs. *Chaplin*. The bankrupt stated that no one besides himself and his wife, and the Messrs. *Chaplin*, and their solicitors, was aware of the assignment of his property to them. It appeared also, that in January, 1883, while the business was being carried on by the bankrupt on behalf of the Messrs. *Chaplin*, one of the creditors pressed for payment, and the bankrupt, by their direction, gave the creditor, after consulting them, some acceptances signed by himself, as a security for his debt.

The Registrar, by his order, declared both the deeds of assignment fraudulent and void as against the trustee, and declared that the property comprised in the first deed formed part of the property of the bankrupt devolving upon the trustee. And he ordered that the Messrs. *Chaplin* should forthwith deliver up to the trustee the property comprised in the first deed, or so much thereof as remained unsold or undisposed of. And he further ordered that the Messrs. *Chaplin* should forthwith render an account upon oath of all their dealings and transactions with the said property, and should pay to the trustee what should by such account appear to be due in respect of such part or parts of the said property as might have been sold or disposed of. And he directed an inquiry to assess the damages sustained by the trustee by reason of the dealings and transactions of the Messrs. *Chaplin* with the said property. And he ordered the assignment of the lease to be delivered up to the trustee to be cancelled.

The Messrs. *Chaplin* appealed.

Winslow, Q.C., and *F. Cooper Willis*, for the Appellants:—

It is said that the assignment was a fraud on the bankruptcy laws, because it was an attempt to change the proper legal forum for the distribution of the debtor's property. But there is no decision to that effect when a *bonâ fide* advance is made by the assignee to enable the debtor's business to be carried on. A sale by a trader in insolvent circumstances, and on the eve of bankruptcy, of the bulk of his property to one of his creditors, in consideration of an old debt and a sum of cash, is not *per se* an act of

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bankruptcy: *Bell* v. *Simpson* (1). The assignment in the present case was an out and out sale; the effect upon future creditors is not to be considered in determining whether it was an act of bankruptcy. In *Hutton* v. *Cruttwell* (2) a trader assigned by way of mortgage all his effects, the consideration being an agreement by the assignee to pay a single creditor of the assignor, and the assignment was held not to be an act of bankruptcy. If such an assignment is valid when the consideration is the payment of one creditor, it must be equally valid when the consideration is the payment of all.

[FRY, L.J.:—What is the distinction between the present case and *Ex parte Zwilchenbart* (3)? There it was held that an assignment of all the property of traders in consideration of the assignees giving promissory notes to the creditors of the assignors was an act of bankruptcy.]

In that case the assignees only covenanted to pay a composition to the creditors. The result of the authorities applicable to assignments of the whole of a debtor's property as security for a past debt, is stated thus by Lord Justice *Mellish*, in *Ex parte Ellis* (4). "The result of the authorities is, that where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance, it is not a question whether the further advance is great or small, but whether there was a *bonâ fide* intention of carrying on the business."

It has been held that the further advance need not be made at the time, or before the time, of the execution of the deed. But a sale of a debtor's property out and out has never been held to be an act of bankruptcy, provided that a sufficient consideration is given for it.

[BOWEN, L.J.:—What is the test of the consideration in such a case?]

Whether a fair value is paid. If it is, the transaction cannot be impeached, unless it is shewn that the debtor intended to run away and cheat his creditors.

(1) 2 H. & N. 410.
(2) 1 E. & B. 15.
(3) 3 M. D. & D. 671.
(4) 2 Ch. D. 797, 798.

[COTTON, L.J.:—Was not the necessary effect of the deed to defeat and delay *Sinclair's* creditors, for the Messrs. *Chaplin* came under no liability to them, and the property was withdrawn from legal process by them?]

In all cases in which an assignment is executed by a debtor of all his property in consideration of an existing debt, and a present advance, his creditors are necessarily delayed.

[COTTON, L.J.:—But then the debtor has money put into his hands which enables him to pay his creditors.]

In *Hutton* v. *Cruttwell* (1) no money went to the debtor, there was simply an agreement by the assignee to pay one pressing creditor, and that was held to be a sufficient equivalent for the assignment. In *Lomax* v. *Buxton* (2) it was held that an assignment of all a trader's property in consideration of an existing debt, and a sum paid by the assignee to a creditor who held a bill of sale over the same property and who had seized under his bill of sale, was not an act of bankruptcy. In the present case the assignees made payments to creditors who held security and to creditors who had none, and *Sinclair* had thus an equivalent for the assignment. If the deed is to be regarded as a mortgage, then advances were made to enable him to carry on his business. The deed was not, therefore, an act of bankruptcy. It was really an out and out sale. The fact that the debtor remained in possession of the property might have been a badge of fraud if there had been any trust for him, but it is not sufficient in the present case to outweigh the other evidence of *bona fides*.

The statute of *Elizabeth* does not apply. Under the *Bankruptcy Act* defeating or delaying creditors is in itself a fraud; under the statute of *Elizabeth* fraud in fact must be proved, the mere defeating or delaying creditors is not enough. The question is, was the transfer a *bonâ fide* one; was it intended that the grantee should have the property and keep it, or was it a mere cloak for retaining a benefit to the grantor: *Alton* v. *Harrison* (3); *Ex parte Games* (4); *Biddulph* v. *Goold* (5). The grantees could not have

(1) 1 E. & B. 15.
(2) Law Rep. 6 C. P. 107.
(3) Law Rep. 4 Ch. 622.
(4) 12 Ch. D. 314.
(5) 11 W. R. 882.

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had notice of any fraud when the bargain was that they should pay all the creditors so far as they were made known to them, and they have in fact been all paid but two. Messrs. *Chaplin* took the precaution of examining the debtor's books. A sale of goods made *bonâ fide* for value is not invalidated by knowledge that an execution is intended: *Hale* v. *Saloon Omnibus Co.* (1).

[FRY, L.J., referred to *Holmes* v. *Penney* (2).]

The settlement there was a voluntary one.

[FRY, L.J.:—But Vice-Chancellor *Wood* said that a settlement for valuable consideration might be fraudulent.]

In such a case it would be essential that the grantee should have notice of the fraud. In the present case the debtor's possession was consistent with the arrangement between the parties, and fraud cannot be inferred from it. The arrangement was not concealed, for the debtor's wife knew of it and so did his landlord.

[BOWEN, L.J.:—In *In re Colemere* (3) Lord *Cranworth* said (4), that, in order that an assignment of all a trader's goods should be fraudulent under the bankruptcy law, it "must be an assignment, not for the purpose of raising money to enable the trader to go on with his trade, but for the purpose of paying some favoured creditor, or making some payments to all his creditors, otherwise than through the Court of Bankruptcy."]

That is not good law now; at any rate it has never been so decided. In the case of an out and out sale the creditors have nothing to do with the question whether the debtor received an equivalent, unless it is shewn that there was an intention to defraud them. There could not be such an intention when all the evidence shews that the intention was to pay them. The business would have been worthless unless Messrs. *Chaplin* had fulfilled their promise to pay the debts. In bankruptcy the Court can go behind a deed and inquire what was the real consideration for it. An assignment of a debtor's whole property on trust for the benefit of his creditors generally is made an act of bankruptcy

(1) 4 Drew. 493.
(2) 3 K. & J. 90.
(3) Law Rep. 1 Ch. 128.
(4) Ibid. 132.

by statute, but the principle is that such a deed provides a mode of administration of the property different from the administration in bankruptcy without any consideration being given to the debtor. That principle cannot apply when, as here, a consideration is given by the assignee. An out and out sale by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase-money, is not an act of bankruptcy, when the purchaser pays a fair price, and is ignorant of the assignor's design: *Baxter* v. *Pritchard* (1); *Rose* v. *Haycock* (2). At any rate the order is wrong in form. At the date of the filing of the liquidation petition the act of bankruptcy was more than six months old, and was not "available" for the adjudication which has been made. Therefore the protection given by sect. 94 applies to all dealings with the goods for valuable consideration: *Ex parte Gilbey* (3); *Ex parte Crosbie* (4). As the Registrar's order now stands we should have to pay over again for goods of which the bankrupt's estate has got the benefit. We ought at least to be allowed the amount of the executions which we paid out and the rent paid to the landlord.

Cooper Willis, Q.C., and *Herbert Reed*, for the trustee:—

The deed is an act of bankruptcy because it altered the forum for the administration of the debtor's property, and necessarily defeated and delayed the creditors: *Worseley* v. *De Mattos* (5); *Ex parte Saffery* (6). A man must be taken to intend the natural result of his acts: *Ex parte Snowball* (7). Every fraudulent transfer of property is an act of bankruptcy, and an assignment of all a man's property to a trustee for his creditors is fraudulent because it changes the forum for administration. This is so quite independently of whether the creditors have been in fact defeated or delayed. If ninety-nine creditors out of one hundred assented to the deed, the other remaining creditor could treat the deed as an act of bankruptcy: *Alderson* v. *Temple* (8); but of course a creditor cannot avail himself of an act of bankruptcy to which he has been party or privy. If a money consideration is

(1) 1 A. & E. 456.
(2) Ibid. 460, n.
(3) 8 Ch. D. 248.
(4) 7 Ch. D. 123.
(5) 1 Burr. 467.
(6) 4 Ch. D. 555.
(7) Law Rep. 7 Ch. 534.
(8) 4 Burr. 2235.

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paid to the debtor himself for the assignment his creditors may be able to get hold of it, but if the assignment is in consideration only of an agreement to pay the creditors, the debtor has not any control, and the effect is to interpose a third person who acts as a shield to protect the property from the creditors. The recitals in the deed are clearly untrue, and this is evidence of fraud. On the face of the deed it does not appear that the grantees are liable to pay anything; it is *ex facie* an assignment of all the grantor's property in consideration of an existing debt, and therefore an act of bankruptcy. And, if you go behind the deed, and inquire into the real consideration, still its effect must be to delay the creditors. It could be set up as a protection against executions by the creditors, and at the same time it concealed from the creditors the fact that Messrs. *Chaplin* had agreed to pay them. Under the order as it stands the Appellants will be allowed all sums which they have properly paid. They cannot be allowed salvage money in relation to a fraud. But the trustee will be content with an order simply setting aside the deeds. The trustee has got the goods which remained undisposed of, and he will get in effect the value of those which have been sold. Messrs. *Chaplin* can prove in the bankruptcy for any moneys which they have paid to creditors. To allow them to be paid these moneys in full would be an encouragement to fraud.

[COTTON, L.J.:—If the deed is set aside the debtor will have been carrying on the business as his own, and any payments made to creditors will be protected, if the creditors, when they received them, had no notice of any act of bankruptcy by the debtor, and there was no fraudulent preference.]

Winslow, in reply:—

Messrs. *Chaplin* made advances which were necessary to enable the debtor to carry on his business. The fact that some of his debts were concealed from them makes no difference. Messrs. *Chaplin* were not parties to any fraud. Unless they can be fixed with some fraud the Statute of *Elizabeth* does not apply. And, there being a *bonâ fide* advance of money to enable the debtor to carry on his business, the assignment was not an act of bankruptcy. An assignment of a debtor's property to a trustee for his creditors,

the trustee making large advances out of his own pocket to pay the creditors, has never yet been held to be an act of bankruptcy.

March 13. COTTON, L.J.:—

The first question which we have to consider is whether the Registrar was right in declaring the two deeds which were executed on the 14th of July, 1882, to be fraudulent and void as against the trustee in the bankruptcy of the grantor. There was a contemporaneous agreement between the parties: whether it was under seal or not is not material, but they were all parts of one transaction, and at the time when these deeds were executed the bankrupt was undoubtedly in some difficulty. He was a retail silversmith and jeweller, and the Messrs. *Chaplin* were wholesale manufacturers of jewellery. He seems to have approached them and desired them to take over his business and all his property, in consideration of which they were to release him from a debt which he owed them, and an arrangement was to be entered into for the payment by them of some of his other debts, but what the debts were which were to be paid by them is somewhat doubtful. [His Lordship stated the effect of the two deeds, and continued:—]

The only debt which was due from the bankrupt to Messrs. *Chaplin* was a sum of about £1370. The exact amount is not very material, but that debt, together with debts which were due and owing by the bankrupt to other persons, made up the sum of £3271, which is mentioned in the first deed as a debt then due from the bankrupt to Messrs. *Chaplin*. As to the £50 mentioned in the assignment of the lease, I do not know how that was arrived at. As I understand it an account was stated, by which £3271 was made out to be the amount of the debt which was to be released with the debts which were to be paid by Messrs. *Chaplin*.

What were the real facts? Previously to this there had been that negotiation which, as I understand, had been begun by the bankrupt. The Messrs. *Chaplin* had undoubtedly paid several sums for him. They had paid out several executions, and on the 31st of July they paid the back-rent then due by the debtor to

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his landlord, but this debt of £3271 mentioned in the deed was not in any way due by him to them. There was, according to the statements both of the bankrupt and of the Messrs. *Chaplin*, an agreement, not in writing, but a verbal agreement, that Messrs. *Chaplin* when they took the business should pay certain debts of his. On the one side it is suggested that they were to pay all the debts he owed. On the other side it is said that they were to take the business subject to the debts, which would mean that they were to pay the debts of the business. That there was some such an agreement I think we must, on the evidence, take to be proved. But it was not in any way reduced into writing; it was a mere verbal agreement, and its terms are not clear.

Then there is this remarkable circumstance, that, although both parties are agreed that the consideration for the deed was something beyond the release of the debt due to Messrs. *Chaplin*, viz., an agreement that they should pay some other debts of the bankrupt, there is not in the deed nor in any paper which appears before us (not even in the agreement that the bankrupt should continue to carry on the business, apparently as the owner of the business, carrying it on as his own business), a single word about the agreement to pay the debts. The Registrar held that these two deeds, the assignment of the lease and the assignment of the personal chattels to Messrs. *Chaplin*, were fraudulent and void as against the trustee. In my opinion that was a correct decision. In my view it is unnecessary to decide whether the deeds are bad under the Statute of *Elizabeth*, but, having regard to the law and practice in bankruptcy, I think both the deeds are bad.

What was the effect of them? The effect was to withdraw by a deed, which was kept secret, all the property of the debtor, as far as it could possibly be done, from the reach of his creditors, so as to prevent them from enforcing their legal rights and remedies by execution, and to protect it in the event of bankruptcy by taking it out of the hands of the debtor, and assigning it to someone else. What did the debtor get in exchange? It is true that a certain sum of money was paid by Messrs. *Chaplin* to some of the creditors, but still the debtor obtained nothing which could be a substitute or equivalent to the creditors. They got nothing except the agreement between Messrs. *Chaplin* and the debtor that

Messrs. *Chaplin* should pay the debts (whether all the debts or not I need not now inquire), but the agreement is left quite indefinite, and there is nothing which in the event of a bankruptcy the creditors could lay hold of. If the agreement had been an open one on the face of the deed, such as the creditors could have laid hold of and enforced by using the name of the debtor, so that when there was a bankruptcy the trustee could enforce it, the matter might have stood in a very different position. But I very much rely on this, that all which was given as a substitute to the creditors for the property which was taken away from them, was the agreement (whatever it was) between the bankrupt and the Messrs. *Chaplin*, an agreement which ought (if it had been a fair and honest one) to have been stated in the deeds, or if not in these deeds, then at least in some deed which could be made available for the purpose of enforcing payment. Then we have this fact, which, though it is not material as regards the original transaction, is material as an index of the intention of the parties, that when one of the creditors was afterwards pressing for payment, it was not Messrs. *Chaplin* who came forward to pay him off or give him security in their own names, but it was the debtor, who, after communication with the Messrs. *Chaplin*, gave him a promissory note of his own, and not as from Messrs. *Chaplin*. This is, in my opinion, material evidence, and, coupled with other things, it induces me to arrive at the conclusion that Messrs. *Chaplin* were intending (and this was the natural effect of the deed) to withdraw the debtor's property from the legal rights of the creditors by execution or otherwise, and to make themselves as safe as they could by taking it into their own hands.

I do not mean to say, indeed I do not think, that the creditors would not have been paid, and I cannot say that this would not have been a good way of paying them. Still, in my opinion, if persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it

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might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors. And I am much struck by this, that the recitals in the deed entirely misrepresent the true nature of the transaction, and in the absence of investigation, they would conceal the truth from any creditor. Indeed they would lead him away from the real truth, and they offer nothing which would enable him to infer it. In my opinion, therefore, the Registrar was right in declaring these deeds void as against the trustee.

Then comes the question what consequential directions ought to be given. The Registrar seems to have considered that the proper course was to treat Messrs. *Chaplin* as having carried on the business by the debtor as their agent, and to make them answerable for all the dealings of the debtor with the property and accountable for all his receipts and payments in the business. Of course, if any of the property comprised in the deed had not been realised at the commencement of the bankruptcy it must go to the estate, but, as I understand, it is not in any way denied, that all the property which remained at that time has been taken possession of by the trustee, and we have not to deal with that. We have to deal with the consequential directions as to the property which was not forthcoming and had been realised, and in my opinion the way in which the Registrar has dealt with it is erroneous. The third document, I mean that under which the debtor carried on the business, made him the servant of Messrs. *Chaplin*, and made his acts acts for which they would be answerable. But, in my opinion, if the two principal deeds are set aside, all the three should be looked upon as one transaction, and if we treat the property which passed by the principal deeds as the property of the debtor, it would be wrong to treat Messrs. *Chaplin* at the same time as having employed the debtor as their servant in carrying on the business. In my opinion, therefore, the Registrar's order, so far as it gave those directions, is erroneous.

There was also an inquiry directed as to the damages sustained by the estate by reason of the deeds. In my opinion there was no case made for that inquiry. I think the proper order to make is, simply to declare that the two deeds are fraudulent and void, striking out all those directions and the inquiry as to damages,

it being admitted that everything in specie has been handed over to the trustee.

It was pressed on us that Messrs. *Chaplin* advanced money for the purpose of carrying on this business, and were, therefore, entitled to have their advances allowed them by way of set-off, the deeds being set side. In my opinion, we ought not to do that. Probably this is not very material if we strike out the inquiries as to the debtor's dealings with the property. But, if any sums were *bonâ fide* advanced by Messrs. *Chaplin*, either before the execution of the deeds or after, they will be entitled to prove in respect of them. I do not say they are entitled to prove, but in respect of any sums properly paid they will be entitled to prove. I think it would not be right to give any special directions as regards any sums which, either before or after the execution of the deeds, they may have paid for the purposes of the debtor's business. They may establish any right of proof which they can, but, in my opinion, we ought not to give them any preference as regards these payments.

BOWEN, L.J.:—

I am of the same opinion. The effect of the two deeds was to assign all the debtor's property. I do not think it necessary to decide whether the deeds were fraudulent and void under the Statute of *Elizabeth*, and within the principle of which *Twyne's Case* (1) is a familiar example. It is sufficient for this present purpose to say that, in my judgment, they are clearly fraudulent and void under the *Bankruptcy Act*.

The principles which relate to mortgages were stated by Lord Justice *Mellish* in *Ex parte Ellis* (2), and the result of the authorities, according to him, is this, that when a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance, it is not a question whether the further advance is great or small, but whether there was a *bonâ fide* intention of carrying on the business. In the present case there could not have been any *bonâ fide* intention of carrying on the business as the business of the debtor, because

(1) 3 Rep. 80 b. (2) 2 Ch. D. 798.

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he was going out of it, and it is impossible therefore to apply the particular test which Lord Justice *Mellish* indicates as appropriate in a large number of cases. The fact is that it is not the case of a mortgage at all. This is an out and out sale, a sale of all the debtor's property for a past debt, plus something additional about which we have to decide. What was that extra something which prevents the deed from being a pure and simple assignment for a past debt? There were some payments made by the grantees at the time, which I will pass by, because there still remains the question, what was the character of the residuum, after you have allowed for all the past debts which had been satisfied and all the present payments which were being made. What is the residuum? Is it a fair equivalent which the debtor gets for what he gives? It seems to me that in this particular instance what the debtor got is a pure question of business and fact. He gave up all his property; he got the payment of past debts to a certain extent, and besides that he got a promise, a verbal promise, made to himself, without any record of it in any paper or in any deed, to the effect that the persons to whom he was assigning his property would, when occasion should arise, come forward and pay his debts.

Now what is the business value of that sort of promise looked at from the point of view of either the debtors or the creditors, a promise, not indicated in the deed, which is the natural record of the transactions, but a collateral verbal agreement, which the creditor, who was receiving the property from his debtor, could, if he was dishonest, at any moment deny? And, if he had denied it, what would the other creditors have known about it? What had the debtor to shew for it? Absolutely nothing. The deed contradicted it, because, though it professed to contain the whole transaction, it stated that there was a debt of over £3000 due to the Messrs. *Chaplin*, instead of the true amount of the debt owing to them which was not more than half that sum.

Looked at from the debtor's point of view, it was a most unsatisfactory arrangement. I do not for a moment mean to say that a debtor who got only a *chose in action* in exchange for such an assignment might not get a most valuable equivalent. It might be a bill of Messrs. *Rothschild*, a promissory note of a

millionaire, or a verbal promise of a man whose word was as good as his bond; but the verbal promise under the circumstances of this particular case appears to me to have been a mere sham. And from the point of view of the creditors also it was a sham. The substance receded into the hands of the favoured creditor, and that which was left behind was not even a shadow, because it was invisible to the eyes of the general body of creditors. They had no reason to know that the verbal promise had been made, and they were left absolutely at the mercy of the favoured creditor and of the debtor, because, unless they could have got the debtor to come forward, they had no means of proving, or even of surmising the existence of the verbal promise on which all depended. It was not a verbal promise to them; it was a verbal promise to the debtor. The debtor's property (independently of the bankruptcy law) was disappearing, and in its place there was left a secret promise made by word of mouth to the debtor himself, not to the body of creditors. I think the necessary effect of the deeds was to defeat and delay the creditors, and I do not hesitate to say that this was the intention of the parties. I do not wish to be understood as saying anything harsh or unjust towards Messrs. *Chaplin* in the matter. When I say that they intended to defeat and delay the creditors, I do not suppose that they intended to defraud them; but I think that they intended to do that the necessary effect of which was to defeat and delay the creditors. They intended to make themselves safe, and to leave the risk to be borne by the general body of the creditors. I do not mean to say that they did not intend to carry out their promise as respectable men of business; I have no doubt they did, but that is not the same thing as leaving the property to be administered for the general body of the creditors in the way which the *Bankruptcy Act* intended. That their intention was that which I have suggested seems to me to be proved by all the surrounding circumstances of the two deeds. In the face of all these facts—the false statement of the consideration for the deeds; that possession was not given in accordance with the deeds, but visits were paid from to time by the Messrs. *Chaplin* to some back room on the premises, so that they might continue a control over the debtor; that the business

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was still carried on in the debtor's name, he being ostensibly the person in command of the business, whereas he had really become a mere servant of the Messrs. *Chaplin*—I do not hesitate to say that they intended to do that which was the actual result of what they did, namely, to defeat and delay the creditors, although I am quite sure that, as honest men, they did not intend to defraud them.

With regard to the rest of the case, I entirely agree with what the Lord Justice has said.

FRY, L.J.:—

I have arrived at the same conclusion as the other members of the Court, but, while I in no way dissent from the views they have expressed, it appears to me that the shortest road to their conclusion is by means of the Statute of *Elizabeth*. That statute is very familiar to us all, but I think it is as well to recur to the precise words of it. The preamble recites that "grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder, *or* defraud creditors and others of their just and lawful actions," and so forth.

Now I emphasise the word "or," because it shews that it was the intention of the Legislature to deal separately with the "intent to delay, hinder *or* defraud," creditors. The operative part of the statute proceeds to set aside every conveyance made "to or for any intent or purpose before declared and expressed."

Now what was the real bargain between the Messrs. *Chaplin* and Mr. *Sinclair?* According to the evidence it was this, that the debt which he owed to them should be extinguished, and that they should undertake the burden of paying his other creditors—whether it was to be all his creditors or only his trade creditors is a matter in dispute. Now how were the deeds drawn? It appears that the total amount which would have been due from *Sinclair* to the Messrs. *Chaplin*, if they had paid all the trade debts which were made known to them, was a sum of £3271.

Now the two deeds were prepared in this way. The assignment

of the leasehold is represented to be in consideration of £50 paid to *Sinclair* by the Messrs. *Chaplin*, and the assignment of the stock-in-trade and other chattels is represented to be in consideration of a debt of £3271 due from him to them. No such debt existed at that time. Why was the deed drawn in that form? It appears to me it was so drawn for the purpose of concealing the real facts of the case, and representing to any persons to whom the deed might become known that that sum was at the time of the execution of the deed due from *Sinclair* to the Messrs. *Chaplin*, to conceal from such person the fact that there was a contract between them and him that they should pay Mr. *Sinclair's* debts, so that, if the deed came to the eye of any of the creditors, he would have no means of knowing or suspecting the existence of any contract beneficial to him which Mr. *Sinclair* could enforce.

Then I ask myself, why was the deed drawn in that way? Was it a mere conveyancing blunder, or was the end and intent to put it in such a form that the remedies of the creditors might be delayed?

I must confess that I did at one time feel some doubt as to this. But when I look, not merely at the form of the deed and the falsity of its statements, but consider, as I am bound to do, the conduct of the parties under it, I come distinctly to the conclusion that the intention was to do that which the deed in fact did, namely, to hide from the creditors the real facts of the case, and thereby—not to defraud them—but to hinder and delay them in enforcing their legal rights.

Now what was the conduct of the parties? It was this. The deed was kept secret; the trade was carried on in the name of *Sinclair;* the debts, so far as they were paid, were paid not in the names of the persons who were bound to pay them, but in the name of *Sinclair*, and when one particular creditor pressed Mr. *Sinclair* and he applied to the Messrs. *Chaplin*, they, instead of coming forward and offering to give security to the creditor or satisfying him, induced Mr. *Sinclair* in his own name to give the creditor promissory notes, and thereby conceal the real facts of the bargain.

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I think, therefore, that these deeds were executed with intent to delay and hinder the creditors in their remedies, and that they are therefore plainly void under the Statute of *Elizabeth*.

Solicitors for Appellants: *Badham & Williams.*
Solicitor for Trustee: *G. B. Bathurst Norman.*

W. L. C.

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Ex parte JOHNSON. *In re* CHAPMAN.

Bill of Sale—Act of Bankruptcy—Assignment of whole Property to secure existing Debt and further Advance—Statement of Consideration—Affidavit on Registration—Jurat—Omission of Commissioner's Title—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2 (1)—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.

When a bill of sale of the whole of a trader's property is executed as security for an existing debt and a fresh advance, the true test whether the execution of the deed is an act of bankruptcy, is, Was the fresh advance made by the lender with the intention of enabling the borrower to continue his business, and had he reasonable grounds for believing that the advance would enable the borrower to do so? If these questions can be answered in the affirmative, the execution of the deed is not an act of bankruptcy.

The Court ought not to look at the uncommunicated intention of the borrower, nor at the actual result of the loan.

The consideration for a bill of sale is sufficiently stated, so as to satisfy the requirements of sect. 8 of the *Bills of Sale Act*, 1878, if it is stated with substantial accuracy—if the true legal or business effect of what actually took place is stated. Strict literal accuracy of statement is not necessary.

The affidavit filed on the registration of a bill of sale was sworn before a commissioner to administer oaths, but in the jurat he merely signed his name, and did not add his title as commissioner:—

Held, that, notwithstanding this omission, the affidavit was sufficient.

THIS was an appeal from an order made on the 9th of July, 1883, by Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy, by which he in effect decided that a bill of sale, executed on the 11th of July, 1882, by *G. S. Chapman*, was valid as against the trustee in his subsequent liquidation.

(1) Vide Bank. Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (b).

G. S. Chapman carried on business as a pawnbroker at No. 108, *Fulham Road*. He owed a large sum to his father's estate in respect of loans which had been made to him either by his father (who died in 1873) or by his executors after his death. The executors were Mrs. *Fanny Chapman* (*G. S. Chapman's* mother) and *Robert P. Lambert*. At the beginning of July, 1882, *Chapman* was being pressed by one of his creditors, and he applied to Mr. *R. Wilson*, the solicitor to the executors, with the view of obtaining a further loan from them. On the 6th of July *Wilson* wrote to *Lambert*, who was then staying at *St. Ives* in *Cornwall*, and on the 7th of July *Lambert* telegraphed to *Wilson*, asking him to let *Chapman* have £200 that day to meet a pressing engagement. The same day *Wilson* sent *Chapman* a cheque of his own for £200, telling him that he did so at the request of *Lambert*, and sending him also "an undertaking to be signed by you, agreeing to execute a bill of sale when required to do so." *Chapman* received the cheque and signed the undertaking. The undertaking was addressed to Mrs. *Chapman* and *Lambert*, and was as follows:—"In consideration of your advancing me the sum of £200 this day, I undertake and agree on demand to execute in your favour a bill of sale of my effects, to secure that amount and the sums I already owe you, and interest thereon at 5 per cent. per annum." On the 11th of July *Lambert* had returned to *London*, and he had an interview with *Chapman* on that day. *Chapman* asked for a further loan, and *Lambert* agreed to advance him a further sum of £200 out of the testator's estate, to secure which and the prior advances he was to give a bill of sale to the executors. This £200 was paid to *Chapman* by *Wilson* by a cheque of his own, and *Lambert* gave *Wilson* a cheque for £400. A bill of sale was prepared by *Wilson* and was signed by *Chapman* the same day.

The bill of sale was made between *Chapman* of the one part, and Mrs. *Chapman* and *Lambert* of the other part. It contained a recital that the mortgagor "is now indebted to the mortgagees in the sum of £4530, and hath applied to them to advance and lend him the further sum of £400, which they have agreed to do upon having the repayment of the same and also the said sum of £4530, and interest thereon respectively, secured in manner hereinafter

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appearing." And it was thereby witnessed that in pursuance of the agreement "and in consideration of the sum of £400 on or immediately before the execution of these presents to the mortgagor paid by the mortgagees," the mortgagor did thereby assign unto the mortgagees all and every his household goods and furniture, plate and plated articles, household linen, books, china, pictures, and other household effects whatsoever, then being or which should thereafter be in, upon, or about his dwelling-house, No. 108, *Fulham Road*; and also all the pledged stock in, upon, or about the same dwelling-house, consisting of plate, jewellery, pictures, soft goods, and miscellaneous articles; and also all the sale stock in, upon, or about the same dwelling-house, consisting of plate, jewellery, pictures, and miscellaneous articles; To hold, receive, and take the said goods, chattels, and premises to the mortgagees by way of mortgage to secure the payment of the £4930, with interest. The bill of sale was registered on the 17th of July, 1882. The affidavit filed on the registration was sworn before a commissioner to administer oaths, but he simply signed his name in the jurat, and did not in any way state the fact that he was a commissioner.

On the 14th of August, 1882, *Chapman* filed a liquidation petition, and on the 8th of September the creditors resolved upon a liquidation by arrangement, and appointed two trustees. The trustees disputed the validity of the bill of sale as against them, on the grounds that its execution was an act of bankruptcy, and that the consideration for it was not stated therein in compliance with the requirements of sect. 8 of the *Bills of Sale Act*, 1878. By arrangement the debtor's furniture and other household effects were sold, and the proceeds of sale were paid into Court. Upon the application of the executors the Registrar overruled the objections to the bill of sale, and ordered the money which was in Court to be paid out to them.

The trustees appealed.

Herbert Reed, for the Appellants:—

The consideration for the bill of sale is not truly stated in it in compliance with sect. 8 of the *Bills of Sale Act*, 1878. £400 was not advanced "on or immediately before the execution of the

deed," and the first £200 was not lent by *Lambert* upon an agreement to give a bill of sale. He instructed his solicitor to lend the money without imposing any condition, and the solicitor without any instructions required the debtor to sign the agreement to give a bill of sale: *Ex parte Carter* (1); *Ex parte Rolph* (2).

The affidavit filed on the registration is insufficient, because it is not stated in the jurat that the person before whom it purports to have been sworn was a commissioner to administer oaths: *Howard* v. *Brown* (3); *Rex* v. *Hare* (4).

The deed is also void as an act of bankruptcy. When a debtor assigns all his property to secure an existing debt, it is a presumption of law that he intends to defeat his creditors: *In re Wood* (5). The fresh advance made in the present case was very small as compared with the old debt, and the fair conclusion is that the object was, not to enable the debtor to carry on his business, but to obtain a security for the old debt: *Ex parte Fisher* (6); *Ex parte Ellis* (7); *Ex parte Foxley* (8).

Crump, and *E. Hume Williams*, for the bill of sale holders:—

The consideration is sufficiently stated in the deed. The advances of the two sums of £200 were really one transaction, and, if they were not, it is enough to state the effect of what was done. It is sufficient to state the consideration with substantial business accuracy; a minute literal accuracy is not required: *Credit Company* v. *Pott* (9); *Ex parte Challinor* (10); *Hamlyn* v. *Betteley* (11); *Ex parte Charing Cross Advance and Deposit Bank* (12); *Ex parte Bolland* (13); *Ex parte National Mercantile Bank* (14).

[On the question of the jurat to the affidavit, they were stopped by the Court.]

As to the act of bankruptcy, the question is, not what was the amount of the fresh advance, but was it made with the intention

(1) 12 Ch. D. 908.
(2) 19 Ch. D. 98.
(3) 1 Moo. & P. 22; 4 Bing 393.
(4) 13 East, 189.
(5) Law Rep. 7 Ch. 302.
(6) Ibid. 636.
(7) 2 Ch. D. 797.
(8) Law Rep. 3 Ch. 515.
(9) 6 Q. B. D. 295.
(10) 16 Ch. D. 260.
(11) 5 C. P. D. 327.
(12) 16 Ch. D. 35.
(13) 21 Ch. D. 543.
(14) 15 Ch. D. 42.

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of enabling the debtor to carry on his business. The debtor's own intention is immaterial: *Ex parte Ellis* (1); *Ex parte Greener* (2).

[FRY, L.J.:—Any communication made by the borrower to the lender may be material to shew what the intention of the lender was, but I do not see how the uncommunicated intention of the borrower can affect the question.]

Herbert Reed, in reply:—

As to the consideration, *Credit Company* v. *Pott* (3) is a case by itself. It was decided on the authority of *Ex parte National Mercantile Bank* (4), which has since been questioned: *Ex parte Charing Cross Advance and Deposit Bank* (5); *Ex parte Rolph* (6); *Ex parte Firth* (7); and the Judge found as a fact that a new loan had been made. There was an account stated between the parties, and that would give rise to a new cause of action. The intention of the Act was that it should appear on the face of the deed what the grantor actually received for it. The plain words of the Act ought to be followed.

As to the act of bankruptcy, the necessary effect of the deed, if enforced, would be to prevent the debtor from carrying on his business, and therefore it was an act of bankruptcy, whatever the intention may have been. It is not only the intention of the lender which should be considered. At any rate, the *onus* is on the lender to shew that he had reasonable grounds for believing that the fresh advance would enable the debtor to carry on his business.

COTTON, L.J.:—

The Registrar has ordered the proceeds of the sale of the furniture and other property of the debtor to be handed over to the holders of a bill of sale, and the order is impeached on two grounds. It is said, first, that the bill of sale is bad under the

(1) 2 Ch. D. 797.
(2) 46 L. J. (Bank.) 76.
(3) 6 Q. B. D. 295.
(4) 15 Ch. D. 42.
(5) 16 Ch. D. 35.
(6) 19 Ch. D. 98.
(7) 19 Ch. D. 419.

Bills of Sale Act, and, secondly, that, if it is not bad under that Act, yet the execution of it was an act of bankruptcy, and therefore the deed is void against the trustees.

I will deal first with the question whether the deed is void under the *Bills of Sale Act*.

The principal objection was that the consideration is not stated, that is, not correctly stated, in the deed.

The deed, which is dated the 11th of July, recites an agreement by the grantees to advance £400 to the grantor, and an advance by them to him of £400 on or immediately before the execution of the deed, and then states that the consideration is that advance and a debt of £4530 previously due and owing.

What actually took place was this. On the 7th of July, 1882, Mr. *Lambert*, one of the executors (the debtor's mother being the other), was in *Cornwall*, and he telegraphed to his solicitor, Mr. *Wilson*, to advance £200 to the debtor, who was his nephew. The money which was to be advanced belonged to the estate of the debtor's father. Mr. *Wilson* being, as might be expected, a little cautious, sent, with the cheque for £200, for signature by the debtor an undertaking to execute a bill of sale in consideration of £200.

It was said that Mr. *Wilson* had no right to do that. He was the agent of Mr. *Lambert* to advance this money on behalf of the executors, and, in my opinion, it was quite right for him as an act of prudence, to say, "I will not pay you this money until I get some security for it." And I think when the debtor received the £200 with this undertaking, which he was asked to sign and send back, he would not have been justified in retaining the £200 without signing the undertaking. It is true that Mr. *Lambert*, who directed the advance, had not made any such requisition; but it was, in my opinion, perfectly right for his agent, Mr. *Wilson*, while he still held the money as agent for Mr. *Lambert*, and not for the debtor, to make this stipulation. That, therefore, was really the agreement entered into by the debtor in order to obtain the advance of the money.

Then on the 11th of July there was a meeting of the debtor and his brother with Mr. *Lambert* and Mr. *Wilson*, and an arrangement was then made that the debtor should have a further

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advance of £200, and that a bill of sale should be immediately executed by him.

That being so, the statement in the deed is that the £400 was paid to the grantor "on or immediately before the execution of these presents."

Now £200 of the £400 had been undoubtedly paid to him on the 7th of July, and the balance only was paid to him on the 11th of July. And, so far as we can see, it appears clear that on the 7th of July there was no agreement to advance a further sum of £200; that the advance then made was only £200, and that, in consideration of that advance, the undertaking was given by the debtor to execute a bill of sale. But when the parties met on the 11th of July there was a request by the debtor for more money, and a further £200 was advanced.

Now I, for my part, am disposed to think that the two transactions of the 7th and the 11th of July may properly be considered as one transaction, and that the statement, that the £400 was advanced "on or immediately before the execution of these presents," is a truthful statement of what really took place, there being only that short interval of four days between the two transactions, so that really the transactions which led up to the bill of sale may be considered as begun by the undertaking given on the 7th of July, and that would be sufficient to prevent our setting the deed aside.

But, if the true view is that there was an agreement on the 7th of July to give a bill of sale to secure the £200 then advanced, and then a new agreement on the 11th of July to give a bill of sale to secure the £400 and the debt which existed before the 7th of July, then, in my opinion, the decision in *Credit Company* v. *Pott* (1) prevents us from holding that this statement of the consideration was not a correct one. In that case there was an antecedent debt of £7350 due by the grantor to the grantee, and no money passed at all, but the bill of sale treated it as a present advance of £7350, and the Court of Appeal held that, although that was not the actual fact, although there was really no advance of £7350 at that time, yet that was the practical effect of this transaction, and that, therefore, the consideration was not untruly

(1) 6 Q. B. D. 295.

stated. It is said that in that case the Judge who tried it without a jury had found that there had been a fresh loan, and that the decision turned on that. But that is not what the Judge really found. He did not find as a fact that any money had passed, but he found that this was the effect of what took place, and that, therefore, it might be treated as if the old loan had been paid off and the money re-advanced. That was not the fact, but still the Court of Appeal thought it was sufficient to consider what was the effect of the transaction, and whether that effect was truly stated. In my opinion, therefore, even if the bill of sale ought to be considered as a new transaction, and that there were two agreements to give a bill of sale, still, on the authority of the *Credit Company* v. *Pott* (1), we ought not to hold that the bill of sale can be avoided on the ground that it does not state in precise detail what took place. That is a decision of the Court of Appeal. I need not say whether I should have given a similar decision, but there it is, and, in my opinion, we should unsettle the law if (whatever individual opinion we may entertain) we were to depart from a decision of the Court of Appeal which is exactly applicable to the case before us.

Then another point was urged. An affidavit has to be filed with the bill of sale when it is registered, and it is said that, as the document which was filed, and which purports to be an affidavit, was sworn before a person about whom nothing is known but his name and his place of business, there being no statement that he was a commissioner for administering oaths, the affidavit cannot be accepted. In support of that contention *Howard* v. *Brown* (2) was cited, in which it was held that, where an affidavit did not state that it was sworn before a commissioner who was entitled to administer oaths, it could not be read. That was in some technical proceedings at Common Law, to which Lord Justice *Bowen* may perhaps refer, but I do not think I need, because, fortunately, we have another case which shews that, however that may be as to technical proceedings, yet, in the present state of the law under the *Bills of Sale Act*, we can arrive at something like common sense. In *Burdekin* v. *Potter* (3) Lord

(1) 6 Q. B. D. 295. (2) 1 Moo. & P. 22; 4 Bing. 393.
(3) 9 M. & W. 13.

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Abinger, on a somewhat similar objection being taken, said, "I think this objection cannot prevail. If you go upon any principle, it would seem that if the party be named at all, the Court may examine to see whether he is one of its commissioners. I doubt whether anything at all need be added to his name." That was not a case under the *Bills of Sale Act*. But Lord Justice *Bowen* has furnished me with another case, *Cheney* v. *Courtois* (1), actually under the *Bills of Sale Act*, 1854, where this very point was decided. There the affidavit was entitled in the Queen's Bench, but the person before whom it was sworn was stated to be a Commissioner of the Exchequer, and the objection was taken that the affidavit was bad, because it was not stated in it that he was a Commissioner of the Queen's Bench. The Court (composed of Chief Justice *Erle*, Mr. Justice *Williams*, Mr. Justice *Willes*, and Mr. Justice *Keating*) overruled that objection. The question was put, "Could the deponent be convicted of perjury if it is false?" and the Court said, "He can, if it is shewn that the man before whom the oath was made was competent to administer an oath in these proceedings." That objection, a highly technical one, was overruled. In the absence of authority I should have come to the same conclusion, but, there being authority, I think the objection is answered by the decision which I have mentioned.

Then we come to another part of the Appellants' case. It is said that, assuming that the deed is not bad under the *Bills of Sale Act*, yet it is void as an act of bankruptcy.

It is said that the deed was an assignment of all the debtor's property to secure an existing debt, there being no substantial present advance, or no advance which would be an equivalent by enabling him to carry on his business.

I have already stated during the argument what I conceive to be the law applicable to these bills of sale, viz., that the greatness or smallness of the advance made by the lender to the grantor though to be taken into consideration is not the real test. The real test is (whatever the amount of the advance as compared with the antecedent debt was), Did the lender intend that the advance should enable the debtor to carry on his

(1) 13 C. B. (N.S.) 634.

business, and had he a reasonable ground for believing that it would enable him to do so? Undoubtedly here the advance is small as compared with the prior debt due to the grantees, and very small as regards the amount of property which was assigned. But was it made to enable the grantor to carry on his business, and was it made with a reasonable belief that it would have that effect?

I must say that the evidence is not quite so satisfactory as one could wish. [His Lordship referred to the evidence, and continued:—] I think that we cannot on the evidence come to any other conclusion than that these two sums of £200, that is £400, were advanced with an honest intention to enable the debtor to carry on his business, and meet those pressing demands which he stated as the reason for his application, and that the lenders might reasonably have believed that the advance would be sufficient to enable him to do so. In my opinion we cannot go into the intention of the debtor, nor on this point can we consider that the result was that the business could not be carried on.

In the view which I take it is not necessary to enter into the question whether this was in fact an assignment of the whole of the grantor's property. If I was obliged to form an opinion on that point I think I should come to the conclusion that (with the exception of some very unsubstantial things) he had nothing else in the world, and that, within the meaning of the rule, this was an assignment of all his property. But, in the view which I take, having regard to the fact that, besides the antecedent debt, there was an advance of these two sums of £200, £400 in the whole, I think we cannot say that the assignment was an act of bankruptcy, even if it included substantially the whole of the debtor's property.

I am of opinion, therefore, that the Appellants fail. But we have had a further investigation, and new evidence has been adduced before us, and therefore I am of opinion that the appeal should be dismissed without costs.

BOWEN, L.J.:—

I am of the same opinion. The first point taken was, that the consideration for the bill of sale was inaccurately and improperly

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stated, having regard to the requirements of the *Bills of Sale Act*.

The *Bills of Sale Act* of 1878 requires that a bill of sale shall set forth the consideration for it. That has been held, and it seems to me with unquestionable good sense, to mean that it must truly set forth the consideration, because a person does not set forth the consideration who instead of it sets out something which is not the consideration. Therefore the Act itself means —though it does not say so in words, it says so impliedly—that the consideration must be truly set forth.

Now, as soon as you have got that far, you have got, it seems to me, as far, or as nearly as far, as you can usefully get towards laying down a legal definition. I always feel a great difficulty about laying down, as if they were definitions of law, what are really canons or cautions as to the way in which you should draw inferences of fact. We have the Act of Parliament, which says that you must state the consideration truly, and how far, then, are we to go on inquiring what is the definition of truth? I think we may usefully go a little further, but perhaps not very much. It seems to me that that which is true, in a bill of sale as everywhere else, is that which conveys a true impression, or which is likely to convey a true impression, to those who are about to be affected by or to act on the document.

Now who are going to be affected by this bill of sale or to act on it? It is drawn up for present purposes, it is not for posterity. It is intended, not for special pleaders, or conveyancing counsel of the Court of Chancery, or for ingenious lawyers in the Court of Bankruptcy. It is drawn up for business purposes, and business men, for traders, bankers, and people who lend money—in fact for the world at large.

If that is so, I cannot help thinking that the Courts have taken the true point of view when they have said, You must take a broad and business view of the transaction, and not look at it with that minute accuracy which persons would use who were examining into it, after the event, in a Court of Justice. It is sufficient if the statement is substantially accurate, to use the language of the Lord Chancellor—if its true legal effect or its true business effect is stated, to use the language of Lord Justice

Brett. That is what has been said in the cases on the point. In *Credit Company* v. *Pott* (1), Lord *Selborne*, L.C., cited with approbation the language of Lord Justice *James* in *Ex parte National Mercantile Bank* (2), where he said (3), "In my view, the real consideration, as between the grantor and grantee, the consideration which would have been properly stated in the deed if the Act had not been passed, is the consideration which ought now to be stated," and Lord Justice *Brett* said (4), that he thought it sufficient if the facts are accurately stated, "either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy." So that, although it is not necessary to go back to principle, I cannot help saying that I should myself agree with that view of the law. But, whether that is or is not the true view, it is the established view.

Now, applying these considerations to the present case, what do we find to be the facts? Here is a debtor who is carrying on business as a pawnbroker. He had lent to him by his father during his lifetime, and by his father's executors afterwards, £4500, of which he did not repay a penny. He finds himself in embarrassment, and he goes to the executor, Mr. *Lambert*, in the first place, and asks him for a further advance to meet pressing engagements. Mr. *Lambert* lets him have £200 on the 7th of July, and Mr. *Wilson*, the solicitor, although he forwards him the £200, sends with it in the same envelope an agreement for the debtor to sign to the effect that he will execute a bill of sale. The debtor does not find the £200 enough. Mr. *Lambert* comes to town, and in four days afterwards they meet—Mr. *Lambert*, Mr. *Wilson*, and the brothers—and then the debtor explains that £200 is not enough, and that he wants £200 more, and he agrees that the bill of sale shall cover, not as originally designed the first £200 only, but the whole £400. Now, for practical purposes, can any human being who is likely to act on that bill of sale be misled by being told that it is executed in consideration of the £400? I agree with Lord Justice *Cotton* that what took place from the 7th to the 11th of July was all one transaction, and that no one could be misled by being told that

(1) 6 Q. B. D. 295.
(2) 15 Ch. D. 42.
(3) 15 Ch. D. 54.
(4) 6 Q. B. D. 299.

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£400 was being given as the consideration for the bill of sale. But, if it was not all one transaction, then it seems to me, applying the principle of *Credit Company* v. *Pott* (1), that, the true business effect of the transaction, and the true legal effect also, have been sufficiently stated. Therefore I think the bill of sale is not void under the *Bills of Sale Act*.

Is it then void because the affidavit filed on the registration did not state that it was sworn before a Commissioner? As to that, I have really nothing to add to what Lord Justice *Cotton* has said, except to say that I should think it was a very gloomy day for English law if the Court of Appeal was to hold an affidavit under the *Bills of Sale Act* void, because, although the name of the Commissioner before whom the affidavit was sworn is stated, the jurat does not describe him as a Commissioner.

Then comes the question as to the act of bankruptcy, and as to that, it seems to me perfectly clear that the law is as Lord Justice *Cotton* has expressed it, and the only question we have to consider (assuming that this deed was an assignment of the debtor's whole property) is, whether, in addition to the past debt, there was a fresh advance made such as will save the transaction from being an act of bankruptcy. To my mind the deed was not an act of bankruptcy, because the advance is proved to have been made to the debtor with the *bonâ fide* intention of enabling him to carry on his business. It is very difficult to speculate about intentions after a matter is over, and when one is judging upon incomplete materials. But I think it was a *bonâ fide* advance really made with the intention of enabling the debtor to carry on his business. There is no real evidence to the contrary.

I think, therefore, on all the grounds that this appeal should be dismissed, and I agree with Lord Justice *Cotton* that there ought to be no costs of the appeal. I think that both Mr. *Wilson* and Mr. *Lambert* have conducted themselves in this transaction in no other way than you would expect gentlemen to do. But, on the other hand, I feel that we have been led into a long inquiry by some slight carelessness or inaccuracy in the way in which the matter was first brought before the Bankruptcy Court.

(1) 6 Q. B. D. 295.

FRY, L.J.:—

The first question is, whether the consideration is truly stated in this bill of sale, in compliance with the Act.

If the matter had been *res integra*, I should have been inclined to take a stricter view of the requirements of the *Bills of Sale Act* than has been taken by the Courts. I should probably not have come to the conclusion to which the Court did come in *Credit Company* v. *Pott* (1), and in *Ex parte National Mercantile Bank* (2). I should have thought it was a dangerous doctrine that the Courts may inquire whether one thing means another. But it has not been the doctrine of the Courts that in stating the consideration in a bill of sale the facts must be stated precisely as they exist; on the contrary, the two or three cases which have been referred to have established the principle that, if the consideration is stated in a manner which may be considered to amount substantially to an accurate representation of the real facts, it is stated with sufficient truth to satisfy the requirements of the Act.

Now it is far more important that there should be uniformity of decision than that each Judge should follow his own view of the right construction of the Act. Therefore, although my own mind does not follow the reasoning of those cases, I entirely submit to the principle which they lay down, and I desire to adopt it and apply it wherever it does apply.

In the present case it appears to me that the real transaction was twofold, that the arrangement of the 7th of July was a completed one—one in which the debtor agreed to give a bill of sale for the old debt and a further advance of £200,—and that a further arrangement—a new arrangement—took place on the 11th of July, by which it was agreed that another £200 should be advanced, and that a bill of sale should be given for the original old debt, and for the two advances of £200 each, and I think that the consideration would have been set forth with more exactitude if this payment of £200 on the 7th of July had been stated. But, looking at the principle established by *Credit Company* v. *Pott*, I must inquire whether the consideration, as it is stated in the deed, may not be deemed to amount to the

(1) 6 Q. B. D. 295. (2) 15 Ch. D. 42.

C. A. 1884 *Ex parte* JOHNSON. *In re* CHAPMAN. Fry, L.J.

same thing as the real facts of the case. It appears to me that it may, and that it may be taken that the £200 which was advanced on the 7th of July was paid back again on the 11th, and was, together with the second £200, advanced again to the debtor, and, although no such transaction in fact took place, yet that imaginary transaction seems to me to be just as good a one as the imaginary transaction which was embodied in the statement of the consideration in *Credit Company* v. *Pott* (1). And, the cases, as I say, having established the doctrine that you may consider whether the real transaction in the particular case may be regarded as the equivalent of the transaction which is stated in the deed, I adopt that doctrine, and apply it to the present case.

Then, as to the point that the bill of sale is void because it is not stated in the jurat to the affidavit that the person who administered the oath was a Commissioner to administer oaths, I will only say that I agree with the view expressed by my brethren.

With regard to the other question, whether the assignment was an act of bankruptcy, I take the inquiry which I have to address to myself in the present case, to be plainly this: Was it the intention of the lenders, in making the advances which they did make, to enable the debtor to carry on his business, or were the advances made by them merely for the purpose of obtaining a security for their old debt?

Now, although the evidence is not so satisfactory as one would have desired, yet, looking at all the facts, I think the answer must be, that the persons who made the advance did so with the intention of enabling the debtor to carry on his business, and that, although the amount advanced bore but a small proportion, either to the antecedent debt or to the amount of the security, yet that the bill of sale was not an act of bankruptcy.

I agree with the rest of the Court that no order should be made as to costs.

Solicitors for trustees: *Champion, Robinson, & Poole.*
Solicitor for bill of sale holders: *R. Wilson.*

(1) 6 Q. B. D. 295.

W. L. C.

KAY, J.
1884
Feb. 22.

In re VALLANCE.
VALLANCE *v.* BLAGDEN.

[1881 V. 335.]

Bond—Immoral Consideration—Continuance of Cohabitation—Presumption.

The testator six months before his death gave a bond to a lady with whom he had cohabited for more than thirty years, conditioned for the payment to her at the expiration of two years of a sum of money and interest; and he continued to cohabit with her until his death. There was nothing on the face of the bond with reference to the cohabitation, and there was no evidence that it was in fact given to secure the continuance of the cohabitation.

Held, that the mere continuance of the cohabitation was not enough to raise the presumption that the bond was given in consideration of future cohabitation, and accordingly that the bond was good.

Observations on *Gray* v. *Mathias* (1).

ADJOURNED SUMMONS.

The testator in this administration action gave an agreement charging a leasehold interest, and also a bond dated respectively the 11th of November, 1880, to a lady with whom he had cohabited for more than thirty years, and with whom he continued to cohabit until his death in June, 1881.

The agreement recited that the testator was justly and truly indebted to the lady in the sum of £6000, and he thereby charged the leasehold interest in question with £6000 and interest in her favour, and engaged to execute a formal mortgage to her when required so to do (subject only to a subsisting charge) to secure the £6000 and interest.

The bond was an ordinary money bond in the penal sum of £6000, and it was conditioned for the payment by the testator, his heirs, executors or administrators, to the lady, her executors, administrators, or assigns, of the sum of £6000 on the 11th of November, 1882, with interest according to the purport of the agreement.

There was no reference whatever to the cohabitation between the parties either in the agreement or the bond.

(1) 5 Ves. 286.

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1884
In re VALLANCE.
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In the administration action the lady had carried in a claim upon the bond and agreement for £6000 and interest. And the Chief Clerk had allowed it in his certificate.

This was a summons to vary the certificate by disallowing the claim upon the ground that the bond was given for an immoral consideration.

The lady was cross-examined before the examiner, when she stated as follows: "The testator gave me the bond because he considered that I was entitled to it. . . . He considered it was a duty which he had to perform in giving me something. . . . After the first bond was given I was intimate with him to his death; I did not at one time say something about leaving him; we never had a quarrel the whole time we lived together. Nothing was said by either of us about breaking off the intimacy at the time the bond was given."

It appeared that previously, viz. in May, 1871, the testator had given the claimant a bond for £5000, but it was not stamped. It was therefore cancelled, and the second bond, under which the present claim was made, was given instead.

Upon this point the claimant stated that she did not ask the testator to give her another bond instead of the first one, nor did she complain of its not being stamped; that he gave her the charge on the leasehold interest at the same time that he gave her the second bond, and they were both instead of the first bond; and that he said nothing about altering the amount in the first bond nor did she to him.

The claimant also alleged that she had made advances to the testator, and that he was indebted to her in November, 1880, for moneys which he had from her at different times. She was positive as to the fact of the testator's indebtedness to her, but her evidence as to the amount of such indebtedness was vague and contradictory.

Robinson, Q.C., and *Dauney*, for the Plaintiffs (who were beneficiaries under the testator's will) in support of the summons:—

A bond given in consideration of future cohabitation is clearly void in law and equity, and the question here is whether the mere fact of the continuance of the cohabitation does not raise

the presumption that the bond was given to secure future cohabitation, and is in consequence void.

In *Pollock* on Contracts (1) it is stated: "Where a security is given on account of past cohabitation and the illicit connection is afterwards resumed, or even is never broken off, the Court will not presume from that fact alone that the real consideration was future as well as past cohabitation, nor therefore treat the deed as invalid." But the authorities cited for this proposition are *Gray* v. *Mathias* (2) and *Hall* v. *Palmer* (3); neither of which bear it out as to the non-presumption from future cohabitation.

The result of the authorities on the subject of contracts founded on immoral consideration is stated by Lord *Selborne* in *Ayerst* v. *Jenkins* (4), which was the case of a settlement before going through a marriage with a deceased wife's sister.

In this case the agreement is a voluntary agreement to make a charge and cannot be enforced, so that the bond stands by itself. The lady's deposition shews that there was a deliberate intention to carry on the cohabitation. They also referred to *Friend* v. *Harrison* (5).

Christopher James, for the executor of the will.

Ingle Joyce, for other parties interested.

E. W. Byrne, for the lady, was not called on.

KAY, J.:—

The question before me is simply whether the Chief Clerk ought to have allowed the claim upon this bond and agreement, and if so, to what extent?

The bond was given by a man to a woman with whom he was cohabiting. There is not a word upon the face of the bond with reference to future cohabitation; if there had been, the bond might have been void. No doubt there are circumstances under which the Court will admit external evidence to shew that in

(1) 2nd Ed. p. 269; 3rd Ed. p. 280.
(2) 5 Ves. 286.
(3) 3 Hare, 532.
(4) Law Rep. 16 Eq. 275, 282.
(5) 2 Car. & P. 584.

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fact the consideration for a bond was the continuance of an illicit cohabitation. The question is whether there is any such evidence here.

Now the evidence here is that long before the bond was given, that is to say, for more than thirty years, these parties had been living together in illicit cohabitation; the bond being dated the 11th of November, 1880. So that it is quite possible that the testator may have given the bond in consideration of the great part he had taken in this woman's life by this cohabitation for thirty years. If so, the bond is perfectly good in equity as well as in law. Is there then any presumption that this was not so? Upon this point the case of *Gray* v. *Mathias* (1) is an authority. There a bond was given by a man to a woman with whom he was cohabiting, which did not disclose any immoral consideration, but subsequently another bond was executed by the same obligor in favour of the same obligee, which on the face of it did disclose that the consideration was an immoral one, as it expressly referred to and secured a continuance of the cohabitation by an annuity in case of separation. A suit was instituted against the woman to compel her to deliver up both the bonds. In giving judgment in that suit *Macdonald*, C.B., said (2): "The case, in short, is this. In the course of cohabitation the first bond was given—a simple voluntary bond. In the course of the same cohabitation the second bond was given, which upon the face of it states a continuance of the cohabitation, and makes it the interest of one of the parties, and no matter which, that that connection should be discontinued. As to the first bond, it is most clearly settled, in cases where it has not been the direct point, and in cases where it has, as, for instance, in *Dillon* v. *Jones* (3), where it was made a question whether there was any understanding for a continuance of the connection in the breasts of the parties, though it was not expressed; and the defendant, being interrogated, said there was not; and therefore it was held good, though only voluntary. In *Hill* v. *Spencer* (4) that is most clearly laid down, and Lord *Camden* said there is little difference between such a bond to a person in this unhappy situation, and giving a sum of money . . .

(1) 5 Ves. 286.
(2) Ibid. 293.
(3) Unreported.
(4) Amb. 641.

the plaintiff comes with no very favourable claim to the interposition of this Court. But he comes in a case desperate with regard to the first bond, for nothing is proved or shewn that can in the least invalidate that as a voluntary bond."

This amounts to a distinct decision that the mere continuance of a cohabitation raises no kind of presumption that a bond given during such cohabitation was given for an immoral consideration. The cross-examination of the claimant has been relied upon, and passages from her depositions have been read in opposition to her claim. It seems that the first bond given was not stamped, and for that reason a second bond was given, and she says, "After the first bond was given I was intimate with the testator to his death. I did not at one time say something about leaving him. Nothing was said by either of us about breaking off the intimacy at the time the bond was given."

Now if anything had been said about the cohabitation being broken off there might be some presumption that the bond had been given to secure future cohabitation. As was said by *Best*, C.J., in *Friend* v. *Harrison* (1), "Persons who connect themselves with women of this description often become extremely attached to them; and the women, aware of that, threaten to put an end to the connection, unless some permanent provision is made for them. If, therefore, the plaintiff obtained this bond from the defendant, intending at the same time to continue the connection, then I am of opinion that the special plea is proved."

So that if she had answered to the questions put to her, "Yes, I did threaten to leave the testator," that might have proved the case and have shewn, that the bond was given to prevent the discontinuance of the connection. But there is no evidence of this kind, nor any trace of it, nor anything bearing upon the point, except the fact that these persons did continue to live together.

Upon that fact is founded the contention that the bond was given in respect of future cohabitation; but I am not bound to hold that it was. Accordingly I decide that the bond is good.

Solicitors: *Davies, Hunter, & Davies; W. J. Myatt; W. H. Elphinstone Stone.*

(1) 2 Car. & P. 585.

W. W. K.

KAY, J.
1884
March 5.

GRIFFITH-BOSCAWEN *v.* SCOTT.

[1883 G. 124.]

Settlement—Power of Appointment—Donee unaware of Power—Exercise of Power—Election—Approbation and Reprobation.

A married woman being (although unaware of it) the donee of a general power of appointment by deed or will over policy moneys payable upon her own death, concurred with her husband in settling certain family estates by an indenture which treated the policy moneys as the husband's own property, and settled them also. Her concurrence in the settlement was for a purpose entirely unconnected with the policy moneys, and under it she took a life interest in remainder after her husband's death in the estates, but no interest in the policy moneys. She survived her husband, received in respect of her life interest in the estates sums exceeding the amount of the policy moneys, and died, having by her will given all property over which she had any disposing power to certain beneficiaries:—

Held, that by her will she had exercised her general power so as to make the policy moneys her own assets, and

Held also, that having taken under the settlement, benefits exceeding the value of the policy moneys, she could not by the exercise of her power take the policy moneys out of the settlement, without making good to the settlement beneficiaries an equal amount from her own estate; and accordingly that the policy moneys must be paid to the settlement trustees.

Semble, The concurrence of the donee of the power in the deed of settlement, for purposes unconnected with the policy moneys subject to the power, and in ignorance of the existence of the power, could not operate as an exercise of the power although the deed purported to pass the policy moneys.

IN the year 1833, *Charles Heaton-Ellis* effected a policy of assurance for £3500 on the life of his wife in the names of two trustees.

It was subsequently brought to the knowledge of the two trustees that he had done so, for in the year 1849 one of them signed an option paper touching the application of a bonus upon the sum assured, and in the year 1859 the other signed a similar paper. Later in the year 1859 a correspondence took place between Mr. *Charles Heaton-Ellis* and the two trustees amounting (in the judgment of his Lordship on this part of the case, which does not call for a report) to a valid declaration of trust, made by

Mr. *Charles Heaton-Ellis*, and accepted by the trustees, which although not binding Mr. *Charles Heaton-Ellis* to keep up the policy at all, irrevocably bound all moneys (if any) that might become payable in respect of the policy if kept up (which in fact it was), and settled such moneys upon trusts under which Mrs. *Charles Heaton-Ellis*, in case she survived her husband (which event happened) took a general power of appointment by deed or will, and their children took in default of appointment as tenants in common.

The subsequent facts bearing upon that part of his Lordship's decision which is the subject of this report were as follows :—

In July, 1863, upon the marriage of *Edward Heaton-Ellis*, the only son of Mr. and Mrs. *Charles Heaton-Ellis*, an indenture of settlement was executed, to which Mr. and Mrs. *Charles Heaton-Ellis* were parties, whereby after (*inter alia*) a recital that "the said policy and the moneys thereby assured and all additions which had been made thereto were then absolutely vested in the said *Charles Heaton-Ellis*, as he thereby declared," Mr. *Charles Heaton-Ellis* (amongst other things) assigned the said policy, and all moneys payable by virtue thereof, to the trustees of that indenture upon trust for the benefit of the intended husband and wife, and the daughters and younger sons of the intended marriage; and by this indenture a life interest in certain estates thereby settled was limited to Mrs. *Charles Heaton-Ellis* in remainder after the death of her husband.

It did not appear that Mrs. *Charles Heaton-Ellis* had any knowledge of the existence of her power of appointment over the policy moneys thus assigned, and she was made a party to the indenture of settlement for the purpose of releasing a right unconnected with them, *i.e.*, that of making irrevocable a revocable appointment to Mr. *Edward Heaton-Ellis*, of a certain sum of £5000.

Charles Heaton-Ellis paid the premiums on the policy during his lifetime, and died in January, 1865, leaving his wife and his son *Edward* his executors, and his wife his residuary legatee; and after his death *Edward Heaton-Ellis* or his executor paid the premiums on the policy until the death of Mrs. *Charles Heaton-Ellis*.

Edward Heaton-Ellis died in September, 1870.

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Mrs. *Charles Heaton-Ellis*, after her husband's death, received rents of the estates settled by the indenture of July, 1863, to an amount largely exceeding the moneys which became payable under the policy; and she died in September, 1880, having by her will devised and bequeathed all property over which she had any disposing power upon trust for her five daughters and the issue of a deceased daughter.

This action was brought by the trustees of the indenture of July, 1863, against the trustees of the policy, and the parties beneficially interested therein or their representatives, to have the right and interests of all parties in the policy and the moneys payable thereunder ascertained and declared by the Court.

Hastings, Q.C., and *Alfred Bailey*, for the Plaintiffs, after contending that the correspondence did not constitute a valid or at all events an irrevocable trust, argued, secondly, that if it did Mrs. *Charles Heaton-Ellis*, by concurring in the settlement of 1863, effected a complete or partial appointment of the policy moneys: *In re King* (1); *Milroy* v. *Lord* (2); and thirdly, that Mrs. *Charles Heaton-Ellis* having taken, under the settlement of 1863, an amount of rents exceeding the amount of the policy moneys, must make good the policy moneys. The case was analogous to that of an infant taking benefits under a settlement, and depended upon the same principles as *Durnford* v. *Lane* (3).

C. G. O. Bridgeman, for the executors of *Edward Heaton-Ellis*. If Mrs. *Charles Heaton-Ellis* had a general power of appointment over the policy moneys, her concurrence in the indenture of 1863 amounted to an exercise of that power and ought to be treated as such: *Poulson* v. *Wellington* (4); *Carver* v. *Richards* (5); *Blake* v. *Marnell* (6); *Wilson* v. *Piggott* (7); but if the policy moneys did not pass under the indenture of 1863, then the estate of *Edward* is entitled to a lien upon them for the moneys advanced thereout for the premiums.

Yate Lee for the trustees of the policy.

(1) 14 Ch. D. 179.
(2) 4 D. F. & J. 264.
(3) 1 Bro. C. C. 106.
(4) 2 P. Wms. 533.
(5) 27 Beav. 488.
(6) 2 B. & B. 35.
(7) 2 Ves. 351.

Robinson, Q.C., and *Lemon*, for the trustees of one of Mrs. *Charles Heaton-Ellis*' daughters. The correspondence constituted a valid and irrevocable settlement of the policy moneys. The power of appointment given to Mrs. *Heaton-Ellis* in case she survived her husband was not effectually exercised by the indenture of the 27th of July, 1863; but the will of Mrs. *Charles Heaton-Ellis* was a valid execution of the power, and the policy moneys passed under the residuary gift in such will: *Lambert* v. *Thwaites* (1).

KAY, J., after deciding that the result of the correspondence was to the effect above mentioned, and stating the subsequent facts, continued:—

Mrs. *Charles Heaton-Ellis* was made a party to the settlement upon her son's marriage for the purpose of releasing some other right which did not at all affect these policy moneys, and she did not in any way purport by that settlement to dispose of these policy moneys, or to join in the disposition of them.

But it has been argued very ingeniously that this may amount after all to an appointment by her supposing she had, as I have come to the conclusion that in fact she had, a general power of appointment; and reference is made to the case of *Poulson* v. *Wellington* (2), where a person who having a power of appointment executed a settlement which recited that in case she died without making an appointment her second husband would be entitled thereto; and the Lord Chancellor said that this "though but a recital yet shewed the intention and agreement of the parties, and amounted to an informal appointment, and as no strict form is requisite to constitute such appointment," he held that it was an appointment and ought to be construed as such.

Now to put the effect of what the Lord Chancellor is there reported to have held, in accurate language, it would come to this, that it amounted in equity to a contract for value to exercise the power, which contract, the power being general, would be enforced in equity. It would be useless to go through the form of having the more formal appointment made, and therefore

(1) Law Rep. 2 Eq. 151. (2) 2 P. Wms. 533, 534.

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equity would take it as if this were a proper appointment. But in that case the facts were that the appointor knew that the settlement exercised to some extent (as I understand the facts) the very power in question, and therefore the recital that so far as she did not formally exercise the power the second husband would be entitled to the property might well indicate on her part an intention that he should have it. But here I am in this curious position, that I have no evidence that the wife had any knowledge whatever of the existence of this trust. So far as the evidence goes there is no reason to suppose that she had any knowledge of it at all. Therefore the question is, assuming she did not know it, whether if she joined in the deed, joining for a perfectly different purpose, joining for the purpose of effecting a release which related to other property exclusively, not affecting to dispose of this particular policy, whether the recital in this deed that the policy absolutely belonged to her husband could indicate an intention on her part to exercise the power of appointment. It would be a very strong thing indeed to say that such a recital in a deed under those circumstances where the person who joined in the deed joined obviously for an entirely different purpose, and had not any knowledge of the existence of the power of appointment, could amount even in equity to an exercise of the power. I should require certainly some more time to consider before I arrived at that conclusion.

But it seems to me unnecessary to consider the point more particularly, because by this deed the wife of Mr. *Heaton-Ellis* took very large benefits (I am told very much larger than the whole of the moneys payable under the policy), and then, after its execution, and in the year 1871, she made her will, and thereby she devised and bequeathed all her residuary property, real and personal, for the benefit of her daughters and the issue of a deceased daughter; and that will, I must take it, was an exercise of this general power of appointment, an exercise which would be completely effective, so far as the power was concerned, to pass the property, which she had a power so to appoint. By the exercise of that general power, this lady, who was a widow, made the property which she did so appoint, assets of her own. Having disposed of it under the general power of appointment,

the question is whether she so doing is not bound to make good to the parties interested under the deed so much as that power of appointment would take out of the deed. I think she is so bound. It is not like the ordinary case of election I agree; but still it is a case in which she having taken large benefits under a deed, which deed affected to dispose of the property over which she had this general power of appointment, cannot afterwards exercise that general power of appointment so as to take these policy moneys away from the trusts of that deed without making good to the parties interested under the deed a similar amount out of her own estate. That is the conclusion I come to, and I believe as all the property went under her will to the same parties, that in effect obliges them to reduce what they have received under the will by the amount of these policy moneys.

Solicitors: *Baileys, Shaw, & Gillett; Bell, Steward, & Steward; Campbell, Reeves, & Hooper.*

W. W. K.

REID *v.* HOARE.

[1884 R. 188.]

Marriage Settlement—"Eldest Son"—Portions for Younger Children—Younger becoming the elder Son—Estates sold under paramount Title, and also under Incumbered Estates Act to pay off Incumbrances.

By marriage settlement an estate was settled on the wife and husband successively for life, with remainder to trustees for a term of 600 years, and subject thereto to the first and other sons in tail. Other estates were settled free from the portions term, but subject to prior charges which entirely absorbed them. The trusts of the term were if there should be any child, or children, of the husband and wife other than or besides an eldest or only son, who by virtue of the limitations should for the time being be entitled to the hereditaments and premises to raise for the portions of such child or children, other than or besides such eldest or only son, 5000*l.*, to be vested in such of them as the husband and wife, or the survivor, should appoint, and in default of appointment equally. There were three children of the marriage, two sons and a daughter. In 1841 the estate was sold, under a paramount title, and produced a sum of about 2400*l.* In 1842 the eldest son died an infant. In 1882 the surviving tenant for life died and the portions became payable. There had been no

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appointment. The younger son who had become the elder and had attained twenty-one claimed to take a share with his sister of the 2400*l.*

Held, that the effect of the settlement was to give 5000*l.* to the sister as a first charge on the estate, and the rest of the estate to the brother, and whether the value of the residue were more or less than the portion, or, as in this case, nothing at all, the brother had no right to claim any share in the prior charge.

ADJOURNED SUMMONS under Rules of the Supreme Court, Order LV. rule 3.

By a settlement dated the 11th of July, 1825, two properties —one situate in the county of *Surrey*, hereinafter called the *Ewell* Estate, and the other a plantation, with slaves, situate in the Island of *Jamaica*,—were settled upon trust, as to the estate in *Jamaica* for a term of 1000 years, and subject thereto, as to both estates, for *Harriet Hoare* for life, and then for her husband, *Edward Hoare* for life, with remainder to trustees for a term of 600 years, and subject thereto to the use of the first and other sons of *Edward* and *Harriet Hoare* successively in tail, with divers remainders over. The trusts of the term of 1000 years were to provide for certain heavy incumbrances on the estate in *Jamaica*. The trusts of the 600 years' term were as follows:— "If there shall be any child or children of the said *Edward Hoare* by the said *Harriet* his wife other than or besides an eldest or only son, who by virtue of the limitations hereinbefore contained shall for the time being be entitled to the hereditaments and premises hereinbefore mentioned in remainder or reversion immediately expectant on the determination of the said term of 600 years," to raise for the portions of such child or children, other than or besides such eldest or only son, 5000*l.*, to be vested in such of them or such of their issue as the husband and wife or the survivor should appoint, and in default of appointment equally, and to vest in sons at the age of twenty-one years, and in daughters at the age of twenty-one years or marriage.

There were three children of the marriage: *Edward* the eldest, the Defendant, Sir *Joseph Hoare*, and a daughter, *Annie Leslie*.

In 1841 the *Ewell* estate was sold, and produced a sum of about 2400*l.*

In 1842 *Edward Hoare*, the son, died under the age of twenty-one years and unmarried.

In 1864 the estate in *Jamaica* was sold under the provisions of the *West India Incumbered Estates Act*, and the proceeds of sale were insufficient to pay the charges on the estate.

In 1882 *Edward Hoare*, the surviving tenant for life, died, and the portions became payable; the two surviving children having long before attained the age of twenty-one years. There had been no appointment made under the power in the settlement.

The elder son, *Edward Hoare*, having died under the age of twenty-one years, was excluded.

Sir *Joseph Hoare*, who was the younger son, claimed to take a share, with his sister, of the sum of 2400*l*.

The estate in *Jamaica* was sold under the provisions of the *West India Incumbered Estates Act*, and the estate in *Surrey* was sold under a paramount title.

Laing, for the trustees, stated the facts.

Robinson, Q.C., and *Vaughan Hawkins*, for Sir *Joseph Hoare*, submitted that his claim to a share of the moneys which were paid to the trustees of the settlement was properly made. The terms of the settlement must not be looked at strictly, but the Court must consider the intention of the settlor. The circumstances which had arisen were not contemplated. Sir *Joseph Hoare* did not come into possession of or enjoy the settled estates, and there was nothing in the settlement which excluded him from taking a share of the moneys which were paid to the trustees. Apart from the true construction of the clause, Sir *Joseph* was not within the words of exclusion. The Court must look at the period of distribution of the fund simply, and Lord *Hatherley's* exposition of the law in the case of *Collingwood* v. *Stanhope* (1) must be taken to be the doctrine of the Court, and it was relied upon as being applicable to this case, though there was no case on all fours with this. The intention was that which should be acted upon, and in all the cases on the subject there had been considerable freedom and laxity with the view of

(1) Law Rep. 4 H. L. 43.

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carrying that out. It was for the other side to shew that Sir *Joseph* was entitled to possession, and not entitled to a share of the fund.

[They referred to the cases of *Duke* v. *Doidge* (1); *Fazakerly* v. *Ford* (2); *Harrison* v. *Round* (3); *Collingwood* v. *Stanhope* (4); *Ellison* v. *Thomas* (5); *Spencer* v. *Spencer* (6); and *Macoubrey* v. *Jones* (7); and asked that the principle found in them should be applied to this case].

Hastings, Q.C., and *Dyne*, for Mrs. *Leslie*, submitted that the intention of the parties was clear. The question of hardship had nothing to do with the case. There were three cases on this subject in which the decisions could not be reconciled: *Peacocke* v. *Pares* (8), *Macoubrey* v. *Jones*, and *Spencer* v. *Spencer*. What had happened was in the contemplation of the parties when the settlement was made. The cases of *Fazakerly* v. *Ford* and *Harrison* v. *Round* were totally distinct from the present case, as would be seen from Lord *Hatherley's* speech in *Collingwood* v. *Stanhope*. Sir *Joseph Hoare* could not be considered to be a younger child for the purpose of taking a portion of the fund. He was excluded by the letter of the settlement, if he were not within the spirit of it. He could not predicate of himself that he was a child within the trusts for portions. Not one of the cases referred to was strictly speaking applicable to the present, which must be considered and dealt with apart from the authorities. Looking at the words of the settlement, Sir *Joseph* was not entitled to any part of the fund, but Mrs. *Leslie* was entitled to the whole of it.

Robinson, in reply.

March 7. KAY, J., after stating the facts above set forth, continued:—

It was admitted that if the estates had remained unsold and were of sufficient value to produce a substantial amount beyond

(1) 2 Ves. Sen. 203, n.
(2) 4 Sim. 390; 1 Ad. & E. 897.
(3) 2 D. M. & G. 190.
(4) Law Rep. 4 H. L. 43.
(5) 1 D. J. & S. 18.
(6) 8 Sim. 87.
(7) 2 K. & J. 684.
(8) 2 Keen, 689.

the £5000, Sir *Joseph Hoare* being entitled to the estates, could not claim to take a share of the £5000. It was argued first, that the estates having been sold the settlement cannot be applied strictly to the proceeds; and secondly, that as they produced less than £5000, even if the settlement applies to that sum, Sir *Joseph Hoare* is not excluded by the terms of it from sharing in the £5000 portions. I am clearly of opinion that I must consider the question just as though the estates had not been sold and were now worth only £2400. Unless the settlement applies to the £2400 as it would to the estate, the portions would not be payable out of that sum, and the foundation of the claim would fail. That disposes of the former of the two contentions.

In support of and in opposition to the second contention, reference has been made to various authorities. In *Peacocke* v. *Pares* (1) the eldest son suffered a recovery, and died without issue before the portions became payable. The second son having thus become the eldest, and not taking any estate under the settlement, was nevertheless held by Lord *Langdale* not entitled to a portion, on the ground that the Act by which he was deprived of the estate could not "reasonably be considered to have been in the contemplation" of the settlor. His Lordship said that the presumption that it was intended to provide for all the children ought to be acted on "in all cases in which a loss of provision occurs by an event which can properly be supposed to have been in the contemplation of those by whom the settlement was made and within their intention to provide for. All the cases," said his Lordship, "appear to me to be consistent with that view. None of them go the length of deciding that every disappointment of a child's provision, from whatever cause it may arise, is to be made good by construction upon the presumption to which I have referred."

In *Spencer* v. *Spencer* (2), where the facts were similar, the Vice-Chancellor of *England* held the son who had become the eldest to be entitled to a portion on the ground that the only child excluded was the child "who should take the estate by virtue of the limitations of the settlement." This case, though decided before *Peacocke* v. *Pares*, was not published till after

(1) 2 Keen, 689.

(2) 8 Sim. 87.

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that decision, and was not cited to Lord *Langdale*. Lord *Hatherley* in *Macoubrey* v. *Jones* (1) seemed to prefer the view of the Vice-Chancellor of *England* in *Spencer* v. *Spencer* (2), on the ground that the event which happened in each of those cases must be taken to have been within the settlor's contemplation. This distinguishes, and probably accurately, contemplation from expectation, treating the former word as properly applicable where the facts which produce a particular result and the possibility of that result were known, though the result was not expected, and it seems according to these cases that if the event which deprives a son of the estate was one which might be contemplated he is entitled to a portion.

But the result of these authorities and of another, *Collingwood* v. *Stanhope*, in the House of Lords (3), to which I shall have to refer more particularly, is only to decide that where the eldest son has disposed of the estate, and died before the time for payment of the portions, the younger son having become the eldest, but losing the estate, is not disentitled to a portion, but the eldest son is, because he has really had the disposal of the estate.

They do not decide that if the estate had been so largely diminished as not to be sufficient to provide for the portions by an event which either could or could not have been contemplated the son entitled to the estate would take a portion. Upon this part of the argument I am so far in favour of the applicant that I think this case must be treated as though the event which has happened was within the contemplation of the settlor in the sense of that word as used in these authorities. By that I mean not that it was expected that the estates would produce less than £5000. On the contrary it seems probable that it was expected that they would produce more, but that it was known that the estate in *Jamaica* was subject to heavy incumbrances, and the possibility that it might not suffice to discharge them cannot therefore be treated as a matter outside the range of contemplation. It is possible that the settlor considered this very matter and framed the settlement in its present form after such consideration. I assume in favour of the applicant that the matter

(1) 2 K. & J. 684.
(2) 8 Sim. 87.
(3) Law Rep. 4 H. L. 43.

must be treated not as though the estate in *Jamaica* had been destroyed by an earthquake, or some other accident which could not have been anticipated, although if it had I do not say that this case could be differently decided.

But does it follow that because the estate is insufficient, and the insufficiency might have been contemplated, that the son is entitled to a share of the £5000?

It is settled that the words "other than a son for the time being entitled to the estates" mean entitled at the time appointed for raising and distributing the portions, which in this case would be the death of the father in 1882.

Suppose the estates to have been unsold, Sir *Joseph Hoare* would then have been entitled to them, subject to the term of 600 years; in other words subject to the £5000. But if they were only worth £2400 it was argued that he would in effect have been entitled to nothing, because the £5000 portions would more than have swallowed up that value. That appears more striking as the estates have been sold, and have produced only £2400. To say that he is entitled to that sum subject to a charge of £5000 is in fact, it was urged, saying that he is entitled to nothing. Does the doctrine of equity enable him in such a case to maintain a claim to a portion as a son not excluded by the terms of the settlement? Courts of Equity have dealt with provisions of this kind in a settlement with what Lord *Hardwicke*, in the case of *Lord Teynham* v. *Webb* (1), called "prodigious latitude of construction." The paramount intention of the settlor has been held to be only to exclude the son who became entitled to the estate, and the words have been very freely dealt with to effect this paramount intention. An eldest son, first tenant in tail in remainder, dying without issue before obtaining possession and before the time of distributing the portions has been held entitled to a portion: *Ellison* v. *Thomas* (2).

A younger son become the eldest at the time of distribution, but deprived of the estate by reason of the father and elder brother having previously barred the entail, and disposed of it, has also been held entitled: *Spencer* v. *Spencer* (3); *Macoubrey* v. *Jones* (4).

(1) 2 Ves. Sen. 198, 210.
(2) 1 D. J. & S. 18.
(3) 8 Sim. 87.
(4) 2 K. & J. 684.

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Even where the father appointed the portions to his then younger children, one of these afterwards becoming entitled to the estate the father has been allowed to revoke the appointment, and make a new appointment excluding that son, although no power of revocation was reserved, a tacit condition being implied in the first appointment that none of the appointees should become entitled to the estate: *Chadwick* v. *Doleman* (1). I do not know whether it has actually been held in any case that all the children were entitled to portions, but such a case is easily conceivable, as for example if the clause of exclusion were of a child becoming entitled under some other disposition to a different estate, and no child in fact became so entitled.

The case of *Fazakerly* v. *Ford* (2) has been referred to, where a shifting clause in the event of lands devised by the will of another devolving upon the person to whom an estate was given, was held not to take effect, upon those lands coming to him burthened with an incumbrance created by a prior tenant in tail under that will. But the cases relating to shifting clauses depend upon different considerations, as was pointed out in the House of Lords in *Collingwood* v. *Stanhope* (3), and can hardly furnish a precedent for dealing with a provision like the one which is now under consideration.

Not one of these authorities has decided the question raised here and no such decision can be found. Reliance was therefore placed upon *dicta* in some of the judgments.

In *Duke* v. *Doidge* (4) the estate having been appointed under a power in the settlement to the third son, the eldest was held entitled to a share of the portions provided for "younger" children, and Lord *Hardwicke* said, "No question, but where a provision is made by a father either by will or settlement for younger children, an elder unprovided for shall be deemed such: and the ground is, that every branch shall be provided for, the Court not considering the words elder or younger." And again, "No case comes up to this: yet they all are, that every child except the heir is considered in equity as a younger; and that eldership not carrying the estate along with it is considered not such an eldership as shall exclude by virtue of such clauses."

(1) 2 Vern. 528.
(2) 4 Sim. 390.
(3) Law Rep. 4 H. L. 43.
(4) 2 Ves. Sen. 203, n.

In *Collingwood* v. *Stanhope* (1), Lord *Hatherley*, dealing with a case in which the eldest son had joined with his father in barring the entail and disposing of the estate, and then claimed nevertheless to share in the portions, said that the principle of these decisions was "a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded," and again, "if this estate could by any means have been carried wholly off, or if the elder son had died in the lifetime of his father, so as never to have enjoyed it, we should have had, in the one case, to consider a state of circumstances in which the case might well have been brought back to those where the elder son does not obtain the benefit intended to be provided for him, or a case coming within the last class of cases, in the same category as *Ellison* v. *Thomas* (2), where, by death, the provision having passed from him, it was held that his executors were entitled to an equal share with the younger children of the family." Later in his speech Lord *Hatherley* said that the foundation of the peculiar equity, which had been carried to a great extent, as in *Chadwick* v. *Doleman* (3), was that the children should all partake equally. Lord *Westbury* in the same case said that the object of such clauses is (4), "that no one child should obtain a double portion at the expense of another." Lord *Cairns* said that the words intend (5) "that the child to be excluded is the child who takes and has the benefit of the bulk of the estates." On that reasoning it was held that the eldest son having in fact had the benefit of the estate by concurring in a resettlement under which he had a life estate could not share in the portions.

If these *dicta* are read apart from the points actually decided they furnish some support to the claim of the present applicant. But all these *dicta* are merely explanations of the grounds on which the Court has used such freedom with the words in the various decisions, to which I have referred. The utmost freedom of construction actually employed has been to reject the word "elder" or "younger," and to hold that the only person excluded is the son who takes the estate.

(1) Law Rep. 4 H. L. 43, 52, 54.
(2) 1 D. J. & S. 18.
(3) 2 Vern. 528.
(4) Law Rep. 4 H. L. 57.
(5) Law Rep. 4 H. L. 62.

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In none of the decisions or *dicta* has the prior right of the portioners to receive their portions out of the estate been questioned. This is the real difficulty of the present claim. In the events which have happened the estate or the remaining proceeds thereof are the property of Sir *Joseph Hoare* subject to a charge of £5000 in favour of his sister. He says in effect the estate will not satisfy the charge, therefore, I claim half the charge. That claim ignores the fact that the charge is by the settlement made prior to his right to the estate. Sir *Joseph Hoare* is clearly the person who if the estate were a valuable one is intended to be excluded from a share in the portions. Has he, in the sense of those words in the settlement, become entitled to the estate. In other words, being the person who was to be excluded, the real question is has the event happened which was to exclude him. Suppose his younger sister not to have attained twenty-one till some time after the death of the tenant for life, the brother would have taken possession of the estate or received the income of this fund from the time of his father's death. Then on attaining twenty-one the sister would claim her portion. Assume that the estate was unsold and the brother in possession of it, and that the estate being then realized produced less than the portion, could the brother deny that at the time for payment of the portion he was entitled to the estate, and that therefore by the terms of the settlement no portion was given to him?

Even if on the father's death the son claimed only a portion he would be entitled in virtue of his right to the estate to all the income until the other portion was payable. If by will a testator devised an estate to one son charged with portions of, say £1000 each, to all his children other than the son entitled to the estate under the same will, and then either by reason of the number of his children increasing or the value of the estate having been miscalculated, or having diminished since the date of the will, there was nothing left after providing for the portions, could the son to whom the estate was given insist upon having a portion?

It is obvious that to maintain his claim there must be read into the settlement in the one case, or into the will in the other, a condition that he is only to be excluded if the estate should prove sufficient to make a substantial provision for him after paying the portions. That is, to the words "for the time being

entitled to the hereditaments" must be added "if such hereditaments should prove sufficient after paying the portions to make a substantial provision for him."

In the supposed case of a will there is no authority for such an alteration. Can the Court have a larger jurisdiction to mould or modify a settlement? To do so would be to say in effect, it is conceived, that the intention of the settlor was to make some provision for the son to whom the estate is given; and, therefore, as that estate has proved insufficient the Court will make that provision by rejecting the words which exclude him, and giving him a portion to which under the words of the settlement he is not entitled.

That would be extremely hazardous, for after all it might be that the settlor did not intend to give the eldest son for the time being more than the chance of the estate realizing something for him, and the Court by using such freedom of departing from the words might defeat the intention. To deprive the portion-charge of its priority for the purpose of admitting him to share would be going far beyond any decision or *dictum* that can be found. Counsel have discreetly admitted that if the estate exceeded in value the charge by any substantial sum, though much less than the charge itself, such a claim could not be maintained. But, logically, if the present claim is good, the brother, if the estate had produced £6000, would be entitled to £3000, reducing the portion to an equal amount.

In my opinion, the effect of the settlement is to give £5000 to the sister as a first charge on the estate, and the rest of the estate to the brother, and whether the value of such residue be more or less than the portion, or, as in this case, nothing at all, I am of opinion that the brother has no right to claim any share in that prior charge.

Solicitors: *E. S. Carr; Farrer & Co.; Leman, Groves, & Leman.*

T. F. M.

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[1884 N. 193.]

Lecture in Manuscript delivered from Memory—Audience admitted by Tickets—Notes taken by Shorthand Writer—Publication of Lecture in "Phonographic Lecturer"—Implied Contract—Injunction.

N., an author and a lecturer upon various scientific subjects, delivered from memory, though it was in manuscript, a lecture at the *Working Men's College* upon "The Dog as the Friend of Man." The audience were admitted to the room by tickets issued gratuitously by the committee of the college. *P.*, the author of a system of shorthand writing, and the publisher of works intended for instruction in the art of shorthand writing, attended the lecture, and took notes, nearly *verbatim*, in shorthand of it, and afterwards published the lecture in his monthly periodical "*The Phonographic Lecturer.*"

On motion for an injunction to restrain the publication:—*Held*, that where a lecture of this kind is delivered to an audience, limited and admitted by tickets, the understanding between the lecturer and the audience is that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes for their own personal purposes, but they are not at liberty to use them afterwards for the purpose of publishing the lecture for profit; and the publication of the lecture in shorthand characters is not regarded as being different in any material sense from any other; and injunction accordingly.

Abernethy v. *Hutchinson* (1) discussed.

A. R. NICOLS, the Plaintiff, was a fellow of the *Geological* and of the *Royal Geographical Societies*, an author of scientific works on zoological and geological subjects, and a lecturer upon various scientific subjects; and Mr. *Pitman*, the Defendant, was the author of a system of shorthand writing—Phonography—and the publisher of works intended for instruction in the art of shorthand writing.

On the 14th of October, 1882, Mr. *Nicols* delivered at the *Working Men's College, Great Ormond Street*, a lecture upon "The Dog as the Friend of Man." The admission to the room was by tickets issued gratuitously by the committee of the college.

The Defendant was present in the room during the delivery of

(1) 3 L. J. (Ch.) (O.S.) 209; 1 H. & T. 28.

the lecture, and took notes, nearly *verbatim*, in shorthand, and he published the lecture in shorthand characters in the February, 1884, number of his periodical "*The Phonographic Lecturer*." Mr. *Nicols* having had the publication brought under his notice on the 22nd of February, 1884, issued a writ in this action claiming an injunction to restrain the Defendant from printing, publishing, selling, delivering, or otherwise disposing of any copies either in shorthand or otherwise of any works or publications being lectures written or delivered by the Plaintiff, and also from reprinting or republishing any lectures, works or publications being lectures written or delivered by the Plaintiff; and that the Defendant might be ordered to deliver up to the Plaintiff for destruction all copies of any such work or publication, &c., in the possession or under the control of the Defendant. He also claimed an account and payment of the profits made by the publication, or damages. The evidence of the Plaintiff was that his lecture "The Dog as the Friend of Man" was written by him in 1882, and that he first delivered it on the 14th of October, 1882; that the MS. was his own property, being written and composed entirely by him, and was not a compilation, but was based upon, and contained the results of many years personal observation, experience and study of the physical and mental characteristics of various races of dogs; that all his lectures were written with a view at first to oral delivery, and ultimately to publication; that since the 14th of October, 1882, he had delivered the same lecture at various places in the country, and that at each place where he had delivered it no persons had any right to be present in the room except those who were admitted to that privilege by himself, or by the committee of the governing body of the institution or college at which the lecture was delivered. Also that at the *Working Men's College, Great Ormond Street*, no persons except the holders of tickets had any right to be present, and that at each of the places where he delivered the lecture it was always understood that the privilege of attending and hearing it delivered did not confer on the persons who heard it any right of publishing it, but that he had, and retained, the sole and exclusive right of printing and publishing it for his own benefit, and that there was an implied contract between him

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and the persons who attended his lecture at each of the places, that none of them should publish it without his permission. Further, that when he delivered the lecture he always had the manuscript before him, though he seldom found it necessary to refer to it, as he knew the same by heart; and that the lecture delivered orally by him was always substantially the same as the manuscript, and though sometimes there might be trifling variations in particular words or phrases, yet such variations were always slight and unimportant.

The Plaintiff's evidence was supported by that of the secretary to the *Working Men's College*, and he further stated that it had always been understood that the privilege of attending and hearing the lectures there did not confer upon the persons who heard them any right to print or publish them for their own benefit, but that the sole and exclusive right of printing and publishing them belonged to the several lecturers by whom they were delivered, and that he always considered that there was an implied contract between the lecturers and the committee, and the lecturers and the persons who were permitted to hear the lectures, that neither the committee nor any of such persons should be at liberty to publish the lectures or any part thereof without the consent of the lecturers.

Mr. *Pitman's* evidence was that he had since 1872 published "*The Phonographic Lecturer*," a small book published monthly, that it contained lectures delivered by public lecturers, and no one but the Plaintiff had made any objection; that the profits derived from the publication of "*The Phonographic Lecturer*" were merely nominal, and that the profits of the February number, 1884 (that in which the Plaintiff's lecture was published), would not exceed the sum of 15*s.*, and he stated that the object of the publication was to assist learners of shorthand of the phonographic system, and not to make a profit; also that when he attended the lecture on the 14th of October, 1882, there was no condition on the ticket against reporting the lecture, that the Plaintiff never intimated any objection to the lecture being taken down, and that he took his notes in the most open manner possible, sitting in one of the front seats; that there was no contract implied or otherwise between the Plaintiff and himself,

that he should not publish his shorthand notes of the lecture in the manner complained of, no condition whatever being attached to his attendance at the lecture. He denied that he had ever published any lecture in typography or longhand as keys to the phonography. The motion for an injunction was by consent treated as a trial of the action.

H. Greenwood, for the Plaintiff, moved for an injunction. The statute 5 & 6 Will. 4, c. 65, s. 5, provided that that Act should not apply to a lecture or the printing of it, of the delivery of which notice should not have been given to two justices living within five miles of the place where the lecture was to be delivered two days before delivery, or to a lecture delivered in any university or public school or college; and that in those cases the law relating thereto should remain the same as if the Act had not been passed. The place where this lecture was delivered was a college—a public college, and the statute does not apply to the case, and I do not rely upon it.

The Plaintiff contends that the law as laid down in the case of *Abernethy* v. *Hutchinson* (1) is sufficient to authorize the Court to grant the injunction which he asks for. In that case Dr. *Abernethy* obtained an injunction from Lord *Eldon* to restrain the publication of the lectures, which he delivered to a class of medical students, in "*The Lancet*," although the lecturer had only notes and not the manuscript of his lectures, such as the Plaintiff here had. The Lord Chancellor held that there was an implied contract between the lecturer and his audience that they would not take down the lecture for the purpose of publication, though each student might make notes for his own use. That decision is still the law of this Court, and the Plaintiff is entitled to the benefit of it. The motion is made on two grounds, either of which is, it is submitted, sufficient for the Court to make an order. First, an author of an unpublished manuscript has a right to an injunction to restrain other persons from publishing it, if they have not been expressly authorized to do so, and the delivery of a lecture for fee or reward is not a publication which takes away that right; and, secondly, and it is a distinct ground, that there was

(1) 3 L. J. (Ch.) (O.S.) 209; 1 H. & T. 28.

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an implied contract between the Plaintiff and the Defendant and the other persons who attended his lecture that they should not make use of the lecture for their own profit to the detriment of the lecturer.

He also referred to *Prince Albert* v. *Strange* (1), and *Kerr* on Injunctions (2), and on the question of costs, to *Upmann* v. *Forester* (3).

P. Stokes, for the Defendant:—

The publication of the lecture was in shorthand characters for the purpose only of affording assistance to the learners of phonography, which cannot be read by the general public, and indeed only by those who have a knowledge of that system of shorthand. The lecture has never been published in longhand. It was printed in a monthly periodical, the profits of which have not exceeded 15*s*. The Defendant at once offered to submit to a perpetual injunction and to give up all the copies of the periodical in his possession. There is no implied contract in this case, and no breach of faith has been committed—at any rate not knowingly. The publication has been a good advertisement for the Plaintiff, and he has sustained no damage. The *College of Working Men* is not an incorporated body, and if the Plaintiff had any wish to protect his lecture he should have given notice, as provided by the statute 5 & 6 Will. 4, c. 65, as such a college is not one of those referrred to in and excepted from the 5th section. The preamble clearly shews that this is not one of the class of institutions to which the statute was intended to apply. The *Copyright Act*, 5 & 6 Vict. c. 45, has no application to the case. There was breach of faith in the case of *Abernethy* v. *Hutchinson* (4), as there it was held that there was an implied contract that the pupils would not take notes of the lectures for publication and profit, and it was upon that ground that the injunction was granted.

Under all the circumstances of this case there ought not, it is submitted, to be any costs on either side.

(1) 1 De G. & Sm. 652.
(2) 2nd Ed. p. 449.
(3) 24 Ch. D. 231.
(4) 3 L. J. (Ch.) (O.S.) 209; and by permission, in 1 H. & T. 28.

KAY, J.:—

This is a case in which the question raised is perhaps a little different from that in the case of *Abernethy* v. *Hutchinson* (1) before Lord *Eldon*. The Plaintiff is a fellow of the *Geological Society* and of the *Royal Geographical Society*, and is the author of several scientific works. He also delivers lectures, and amongst the subjects upon which he has lectured is one which he has called "The Dog as the Friend of Man." I take it from the Plaintiff's affidavit that before he delivered the lecture he had written it, and that he never published the manuscript. Having written it he delivered the lecture in October, 1882, at the *Working Men's College, Great Ormond Street*, and upon that occasion the audience were admitted, not on payment, but by special leave by obtaining tickets; and only those persons who received tickets could attend and hear the lecture. The Defendant is a shorthand writer, and he attended and took down a copy—almost *verbatim*—of the lecture in shorthand; which of course he had a perfect right to do. Merely taking down a lecture in shorthand is not a breach of any right at all. The Defendant might take notes of the lecture and use them for the purpose of refreshing his memory, or for any similar purpose he might choose.

The question here is whether having taken the lecture down he had a right to publish it and for profit. He states that the profits have been very small, but of course I cannot take any notice of that. Whether the profits have been large or small the question of right of publication must be just the same. Now, had he that right or not? It has been argued, and very properly, that this case is distinguishable from that of *Abernethy* v. *Hutchinson*. It seems that in that case, Lord *Eldon*, as his manner was, "doubted," and would not in the first instance make any order. The case stood over on more than one occasion, and was re-argued; and upon the ultimate argument an additional affidavit which had been made, was read, and it stated in effect that Dr. *Abernethy* had given his lecture orally and not from a written composition; but that he had notes which amounted to a great mass of writing written in a very succinct manner from which he delivered the lecture, and that a considerable portion of

(1) 3 L. J. (Ch.) (O.S.) 209; and by permission, in 1 H. & T. 28.

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such notes had been extended and put into writing with a view to publication; and that at the time of delivering his lecture he did not read or refer to any writing, but delivered it orally from recollection of his notes. Afterwards, the bill was amended by the introduction of allegations which were verified by affidavit, and they were, "that no persons had a right to attend the lecture except those who were admitted to that privilege by the lecturer; that it had always been understood by him and those that preceded him in the office, and those who attended the lectures, that the persons who so attended did not acquire, and were not to acquire, any right of publishing the lectures which they had heard; but that the Plaintiff and his predecessors respectively had and retained the sole and exclusive right of printing and publishing their respective lectures for his and their own respective benefit; that there was an implied contract," of course that negatives the notion of there being any express contract "between the plaintiff and those who attended his lectures, that none of them should publish his lectures or any part thereof."

Upon that additional evidence, after very mature consideration, the Lord Chancellor delivered judgment. He stated (1) "that where the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same principle upon which literary composition was protected; because the Court must be satisfied that the publication complained of was an invasion of the written work; and this could only be done by comparing the composition with the piracy. But it did not follow, that, because the information communicated by the lecturer was not committed to writing, but orally delivered, it was therefore within the power of the person who heard it to publish it. On the contrary, he was clearly of opinion, that whatever else might be done with it, the lecture could not be published for profit." I understand that to mean that every person who delivers a lecture which is not committed to writing, but which is orally delivered from memory, has such a property in the lecture that he may prevent anybody who hears it from publishing it for profit. Then his Lordship went on to say: "He had the satisfaction now of knowing, and he did not possess that knowledge when this question

(1) 1 H. & T. 39.

was last considered, that this doctrine was not a novel one; and that this opinion was confirmed by that of some of the Judges of the land." All those are general observations without the least reference to the facts of that particular case. Lord *Eldon* then added, that "He was, therefore, clearly of opinion, that, when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling." His Lordship went on to observe that "there was no evidence" how "the defendants got possession of the lectures; but as they must have been taken from a pupil, or otherwise in such a way as the Court would not permit, the injunction ought to go upon the ground of property; and although there was not sufficient to establish an implied contract as between the plaintiff and the defendants, yet it must be decided, that, as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit, there was sufficient to authorize the Court to say, the defendants shall not publish." Now, it is quite true that the learned Judge seems at one moment to refer to the ground of property and at another to that of implied contract. But I take his meaning to be this, that where a lecture of this kind is delivered to an audience, especially where the audience is a limited one admitted by tickets, the understanding between the lecturer and the audience is that whether the lecture has been committed to writing beforehand or not the audience are quite at liberty to take the fullest notes they like for their own personal purposes, but they are not at liberty, having taken those notes, to use them afterwards for the purpose of publishing the lecture for profit. That is the ground upon which I am going to decide this case. The case does not come within the statute of 5 & 6 Will. 4, c. 65, because notice in writing was not given to two justices under the 5th section, and it does not appear that it is a case in which an effective notice could have been given, because it was a lecture delivered at the *Working Men's College*—a public college.

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I think it is sufficiently proved before me that the place where it was delivered answers that description. But if notice be not given, or if the place be a public school or college, or any public foundation, then the law relating thereto is to remain the same as if the Act had not been passed. That is the law as laid down by Lord *Eldon*, and it is the law which I am bound to administer in this particular case. I therefore hold that this is a case in which the Defendant ought to be restrained by injunction from publishing the lecture. I cannot regard the publication of the lecture in shorthand characters, the key to which may be in the hands of any person who chooses to buy it, as being different in any material sense from any other kind of publication.

The Defendant assents to an order for a perpetual injunction, and therefore it will be made in the terms of the notice of motion, and as the Defendant invaded the Plaintiff's right, he must pay the costs of the action.

An inquiry as to profits or damage was waived.

Solicitors: *A. Calkin Lewis; Yarde & Loader.*

T. F. M.

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March 19, 22,

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[1883 D. 2138.]

Settlement—Construction—"Eldest or only Son."

Sir *C. D.* (who died in 1857), by deed in 1852, appointed a fund to trustees in trust for his daughter Lady *W.*, for life and after her death in trust for the child or all the children, "except an eldest or only son," if more than one, of Lady *W.*, who should attain twenty-one or marry; and failing such trusts then over.

Lady *W.* died in 1883, having had four children only, viz., *Thomas*, her eldest born son, who attained twenty-one in January, 1869, and died in April following, Sir *F. W.*, who attained twenty-one in 1880, *Helena*, who attained twenty-one in 1865, and *Edith*, who died in infancy, in 1864; so that the fund vested in *Helena* (subject to let in other children) in the lifetime of the eldest born son, and before he attained twenty-one.

At the date of the deed certain estates stood limited under a settlement, to which Sir *C. D.* was a party, to the use of Sir *T. W.* (the husband of

Lady *W.*) for life with remainder to the use of the first and other sons of Sir *T.* and Lady *W.*, in tail male.

In March, 1869, Sir *T. W.* and his son *Thomas*, disentailed the estates, and limited them to the appointees of both, or of the survivor. The joint power was not exercised; but after the death of *Thomas*, Sir *T. W.* by will appointed the estates to Sir *F. W.* for life, with remainder to his sons in tail male. Upon Lady *W.*'s death Sir *F. W.* claimed half the fund, and *Helena*, the whole of it:—

Held, that, if the expression "eldest or only son," was to be read as referring to a son entitled under a settlement to settled estates, the time for ascertaining the excluded son would be the time for distributing the younger children's portions; but that if that expression was to be read according to its natural meaning, the time of vesting would be the time for exclusion:

Held, also, that the words an "eldest or only son" *primâ facie* mean an individual, and that as there was an eldest son in existence when the provision vested in *Helena*, the clause of exclusion applied to him, and its operation was exhausted, so that any other son who attained twenty-one was entitled to take.

And *held*, accordingly, that Sir *F. W.* was entitled to one half of the fund. *Matthews* v. *Paul* (1) observed upon.

SPECIAL CASE, pursuant to Rules of Court, 1875, Order XXXIV.

By a deed poll, dated the 29th of July, 1852, Sir *Compton Domvile* appointed to trustees after his death a certain sum of £70,000, as to £35,000, one moiety thereof, upon certain trusts in favour of his daughter *Emily Frances Domvile* during her life, and of her children after her death, and failing such trusts as to one-fourth part of the said sum of £35,000, upon trust for his daughter Dame *Anne Helena Winnington* for life, and from and after her decease to stand possessed of the same fourth part and the income thereof, "In trust for the child, if only one, or all the children, except an eldest or only son, if more than one, of my said daughter, *Anne Helena Winnington*, who either before or after the determination of the previous trusts shall attain the age of twenty-one years or marry, and if more than one, equally, with trusts or powers of maintenance, accumulation, and advancement, corresponding with those expressed, as to the entirety of the said trust funds in favour of the child or children of my said daughter *Emily Frances Domvile*, and failing such trusts then upon such trusts as my said daughter *Anne Helena Winnington*, notwith-

(1) 3 Sw. 328.

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standing any coverture, shall appoint." And in default of such appointment in trust for her next of kin.

Sir *Compton Domvile* died on the 23rd of February, 1857.

Emily Frances Domvile, the tenant for life, died on the 15th of August, 1864, without having been married, whereupon Dame *Anne Helena Winnington*, became entitled in possession for her life to the income of the one-fourth of the sum of £35,000, and she died a widow on the 28th of March, 1883. She had four children only, viz.: (1.) *Thomas Edward Winnington*, her eldest son, who attained twenty-one on the 9th of January, 1869, and died on the 6th of April, 1869; (2.) The Defendant, Sir *Francis Winnington*, her second son, who attained twenty-one on the 24th of September, 1870; (3.) *Helena*, the wife of the Honourable *F. S. A. Hanbury-Tracy*, who attained twenty-one on the 8th of October, 1865; and (4), *Edith*, who died in 1864, an infant and unmarried.

At the date of the deed-poll of July 29th, 1852, various manors and hereditaments of considerable value stood limited under the marriage settlement of Sir *Thomas Winnington* and Dame *Anne Helena Winnington* (to which Sir *Compton Domvile* was a party), to the use of trustees for a term for securing to Lady *Winnington* pin money during the joint lives of herself and her husband, and subject thereto to the use of Sir *Thomas Winnington* for life with remainder (subject to a jointure rentcharge in favour of Lady *Winnington*, and a term for securing the same) to the use of other trustees for a term of 1000 years upon trusts for securing portions for younger children or an only daughter of the then intended marriage, and subject thereto to the use of the first and other sons of Sir *Thomas Winnington* by the said Dame *Anne Helena Winnington*, successively in tail male.

At the date of the deed-poll, the said *Thomas Edward Winnington* was the eldest and first-born son of Dame *Anne Helena Winnington*.

On the 24th of March, 1869, Sir *Thomas* and his eldest son *Thomas Edward* disentailed the estates, and limited them to the appointees of both, or of the survivor, subject to an annuity of £500 to the son *Thomas Edward*, during their joint lives.

The joint power was not exercised, but Sir *Thomas* by his will

in July, 1869, after the death of his eldest son, appointed the hereditaments (subject to a legacy of £2000 for his widow, to be paid out of the rents) to his second son, Sir *Francis*, for life, remainder to his sons successively in tail male.

The question for the opinion of the Court was who, under the circumstances, was or were the person or persons entitled to the one-fourth share of the £35,000, and in what shares or manner, if more than one.

Dauney, for the Plaintiffs, the trustees for the deed-poll.

W. Pearson, Q.C., and *Keary*, for Sir *Francis S. Winnington*:—

Sir *Francis* is entitled to the half of the one-fourth of this £35,000. For the description given by the settlor of the person whom he intended to exclude from sharing in this one-fourth, *i.e.*, an eldest or only son of his daughter is not properly applicable to him. This is not the case of a provision made by a person *in loco parentis*, nor is there any reference to a settlement of family estates with the design of excluding the son who should become entitled thereto; and the words must be construed according to their *primâ facie* and literal meaning, as "eldest born," and not as "eldest for the time being." But even if the settlor had been a person *in loco parentis*, Sir *Francis* would still be entitled to share in this fund, for he did not acquire the settled estates under the settlement, but under the will of his father. *Spencer* v. *Spencer* (1); *Macoubrey* v. *Jones* (2); *Lyddon* v. *Ellison* (3); *Ellison* v. *Thomas* (4); *Lord Teynham* v. *Webb* (5); *In re Theed's Settlement* (6); *Adams* v. *Adams* (7); *Sandeman* v. *Mackenzie* (8).

They were then stopped by the Court.

Robinson, Q.C., and *R. O. Turner* for the trustees of a settlement made on the marriage of Lady *Winnington's* daughter *Helena* the wife of the Hon. *Hanbury-Tracy*. The only question is whether we are entitled to one half, or to the whole of this one-fourth, and we contend that we are entitled to the whole of it. Mrs. *Hanbury-*

(1) 8 Sim. 87.
(2) 2 K. & J. 684.
(3) 19 Beav. 565.
(4) 1 D. J. & S. 18.
(5) 2 Ves. Sen. 198.
(6) 3 K. & J. 375.
(7) 25 Beav. 652.
(8) 1 J. & H. 613.

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Tracy is the only child of Lady *Winnington*, who attained twenty-one or married, except *Thomas Edward*, who was the eldest born, and Sir *Francis*, who at the time of his attaining twenty-one, and of the death of Lady *Winnington*, was her only son.

Both these sons are accordingly excluded; *Matthews* v. *Paul* (1), in which case the judgment of Sir *T. Plumer* (2) points to the exclusion of more than one son. The later authorities which decide that in settlements not made by parents or persons *in loco parentis*, the period of vesting, and not the period of distribution, is the time for ascertaining who is the eldest son excluded (such as *In re Theed's Settlement* (3), *Adams* v. *Adams* (4), and *Sandeman* v. *Mackenzie* (5)), are distinguishable, because in all of them the younger son had attained a vested interest as a younger son when his elder brother died, and therefore he was not excluded. *Chadwick* v. *Doleman* (6); *Gray* v. *Earl of Limerick* (7); *Livesey* v. *Livesey* (8); *In re Bayley's Settlement* (9); *Swinburne* v. *Swinburne* (10); *Adams* v. *Robarts* (11), were also referred to in the course of the arguments.

KAY, J.:—I will look through the cases, and if I desire to hear a reply will say so.

March 22. KAY, J. (after stating the facts):—

If I were to assume that in the provision made by Sir *Compton Domvile* for the younger children of Lady *Winnington*, the exception of an eldest or only son was, because of his being entitled to the family estate under the settlement of his father, and if I were at liberty to read "eldest or only son" as "eldest or only son for the time being entitled to the estate settled by his father's marriage settlement," *Thomas*, the eldest son, having joined in the disentailing deed under which he took benefits, must be treated as having had and enjoyed the estate, and he would be excluded. The second son, Sir *Francis*, though he was the eldest at the

(1) 3 Sw. 328.
(2) Ibid. 337, 340.
(3) 3 K. & J. 375.
(4) 25 Beav. 652.
(5) 1 J. & H. 613.
(6) 2 Vern. 528.
(7) 2 De G. & Sm. 370.
(8) 2 H. L. C. 419; and 2 Jarm. (4th Ed.) 206, 210, 211.
(9) Law Rep. 6 Ch. 590.
(10) 17 W. R. 47.
(11) 25 Beav. 658.

time for distribution of the provision for younger children made by Sir *Compton Domvile*, would not be excluded, because he did not take the estate under his father's settlement, but by a different title derived under the disentailing deed. *Spencer* v. *Spencer* (1); *Collingwood* v. *Stanhope* (2); *Macoubrey* v. *Jones* (3).

But in this case there is no reference in the deed of appointment of Sir *Compton Domvile* to the father's marriage settlement, and except the fact that Sir *Compton Domvile* was a party to that settlement there is nothing to shew that he had it in his mind when making the appointment, and I do not think that I am at liberty to read the words "eldest or only son" as meaning the son entitled to the family estate, as I might in the case of a provision by the father himself, or of a person who must for this purpose be treated as *in loco parentis*: *Livesey* v. *Livesey* (4).

The case then comes within that class of which *Matthews* v. *Paul* (5) is an example, and that decision has been so much relied on in the argument that it is necessary to examine it somewhat closely. The gift there was by will of personal estate in trust for the daughter of the testatrix for life, and then for her husband for life, and then upon trust to assign the same to the children of the daughter, if more than one, except an eldest son, equally share and share alike, and if but one, then the whole to such only child, the same to be vested interests, and transferable at their ages of twenty-one years with a direction to accumulate meanwhile the income of the respective shares for their benefit, and if any child should die under twenty-one, leaving children, the share of such child to go among the children, otherwise to go to the survivor or survivors, and in case the daughter should leave no child, or leaving such, they should all die under twenty-one without children, then over. The daughter of the testatrix survived her. She had two sons and five daughters, the eldest son attained twenty-one, and died before his younger brother had attained that age; but the eldest child was a daughter who attained twenty-one before the eldest son. Sir *Thomas Plumer* held that the second son was not entitled to share, on the ground that the time of ascertaining the person who sustained the

(1) 8 Sim. 87.
(2) Law Rep. 4 H. L. 43.
(3) 2 K. & J. 684.
(4) 2 H. L. C. 419.
(5) 3 Sw. 328.

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character of eldest son was the period of distribution. His reasoning seems to be that the words "an eldest son" shewed that the testatrix referred not to an individual, but to a character, and the single question, he says, is at what period is that character to be ascertained. He rejects the suggestion that it could mean the eldest son at the date of the will, and then he considers whether it could be the eldest son at the death of the testatrix. But he holds that the shares could not then be vested in the children without negativing the several gifts over providing for every possible case, and thus he arrives at the conclusion that the time of distribution (which as to the fund in question was the termination of certain Imperial annuities in May, 1819, up to which time the testatrix had directed that the fund should be accumulated), was the period to be regarded for ascertaining the individuals excluded, and that as the second son then sustained the character of an eldest son he could not take. It seems to have been assumed that his elder brother did not take, and consequently two persons were excluded. At page 341 the learned judge intimates that even had the words been more favourable for the argument that the second son took a vested interest, yet that a tacit condition was annexed to the gift divesting it in case he became the eldest son. The case was a very peculiar one, and some of the reasoning of the learned judge seems open to the criticism in *Jarman* on Wills (1).

If it be taken as a decision that the gift of a vested interest in a legacy to children other than an eldest or only son, where the exclusion is not with reference to an estate, deprives every son who may become the eldest before the time of distribution of any share, and that a vested interest of that kind contains a tacit condition divesting it on the younger becoming an elder before the period of distribution, I confess I should have great difficulty in agreeing with such a construction.

The doctrine of *Chadwick* v. *Doleman* (2) applies only to cases where eldest son means the son entitled to a particular estate, and the only ground of that doctrine is to prevent his having both the estate and also a portion; and, as Mr. *Jarman* points out, in the earlier part of his judgment Sir *T. Plumer* treats the case as not being within that class of decisions.

(1) 4th Ed. vol. ii. pp. 210, 211.

(2) 2 Vern. 528.

In re Theed's Settlement (1) was the case of a gift to one for life and at her death to all her children, except her eldest or only son, in equal shares, at their respective ages of twenty-one, and the time of ascertaining the eldest son was held to be the period when the gifts vested, that is when the eldest of the younger children attained twenty-one. And a younger son having attained twenty-one and having subsequently become the eldest by the death of his elder brother, it was held that he was not excluded. Lord *Hatherley*, in his judgment, explains the decision in *Matthews* v. *Paul* (2) thus: "Sir *Thomas Plumer* held that the gift was not vested until the younger child became the eldest, and he then said, what was the key to his whole judgment, that, in gifts to classes, the period of vesting was to be taken both for the purpose of ascertaining the class and also for the purpose of exclusion; and upon that principle he held that the younger son, who had become the eldest, was excluded."

What Sir *T. Plumer* actually said was, that "the period of distribution" was the time for ascertaining the class to take and the character which excluded. But he seems to treat that period as the time of vesting also, a conclusion somewhat difficult to arrive at.

The case of *In re Theed's Settlement*, and the words I have read from the judgment, fix the time when the gift to the younger children vested as the time when the eldest son who was to be excluded should be ascertained. A similar construction was adopted in *Adams* v. *Adams* (3); in *Adams* v. *Robarts* (4); and in *Sandeman* v. *Mackenzie* (5).

Livesey v. *Livesey* (6) is a decision of the House of Lords, that where you cannot read "eldest son as meaning son entitled to a particular estate the words must have their literal signification." The gift there was to the children of *E.*, except her eldest son, or such of her sons as should by the death of an elder brother "become an eldest son," to be divided when the younger child attained twenty-one, and it was held that any child who had then "become" an eldest son was excluded, although such exclusion left him without a provision.

(1) 3 K. & J. 375, 380.
(2) 3 Sw. 328.
(3) 25 Beav. 652.
(4) 25 Beav. 658.
(5) 1 J. & H. 613.
(6) 2 H. L. C. 419.

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The peculiarity of the present case is that in the lifetime of the eldest son this provision for children other than an eldest son vested in his sister, who had attained twenty-one, subject to let in other daughters and younger sons who should afterwards attain that age or marry. There is no doubt that the words excluding the eldest son operated at that time to deprive the then eldest son of a share. But his younger brother did not attain twenty-one until after his death, and consequently when he attained twenty-one he was the eldest son, and it was argued that the clause of exclusion thereupon operated again and he was not entitled. It is obvious that if this be the effect of the words any number of children might be excluded by each becoming successively an eldest son before his share vested, but I am not aware of any authority for such a construction, unless it can be considered that this was involved in the decision in *Matthews* v. *Paul* (1).

In my opinion this construction is not admissible. If the cases in which eldest son has been taken to mean son entitled to a particular estate do not apply there is no ground for any latitude of construction. An eldest or only son, *primâ facie*, means one individual, and not a series of persons. When the provision vested in the eldest daughter, there being an eldest son in existence, the exclusion applied to him and the clause of exclusion was satisfied, and its operation was exhausted, and all other sons who attained twenty-one were entitled to take.

Therefore in either view, whether eldest son should be read son entitled under the father's marriage settlement to the settled estate, in which case the time for ascertaining the excluded son would be the time of distributing the younger children's portions; or, on the other hand, if eldest son is to be read here according to its natural meaning, as I think it should, in which case the time of vesting is the time for exclusion, the son who was the eldest is the person to be excluded, and Sir *Francis*, the second son, is entitled to share in this provision made by Sir *Compton Domvile*.

Solicitors: *A. F. & R. W. Tweedie; Young, Jackson, & Beard; Robinson, Preston, & Stow.*

W. W. K.

(1) 3 Sw. 328.

In re WALHAMPTON ESTATE.

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1884

March 14, 21, 26.

Mortgage—Voluntary Settlement by Mortgagor—Subsequent Mortgages by same Mortgagor of the settled and also of other Property—Consolidation—Sale by First Mortgagee under Power—Title to surplus Sale Moneys.

A. B. having executed a voluntary settlement of the *W.* estate mortgaged it in fee to *X. Y.* He afterwards mortgaged the *Q.* estate, and that mortgage became vested in *X. Y.*:—

Held, that *X. Y.* was not entitled to consolidate as against the persons claiming under the voluntary settlement the mortgages on the *W.* and *Q.* estates.

A. B. having mortgaged estates in fee simple, subsequently made a voluntary settlement of the same estates and all his interest therein to grantees to uses to hold, subject to the mortgage and to a power of raising a sum of money for himself, to the use of himself for life with remainder to his first and other sons in tail, with remainders over.

The mortgagee afterwards sold the estates under the power of sale in the mortgage, and after retainer of his debt and costs paid the balance of the sale moneys into Court under the *Trustee Relief Act*. Upon a petition for payment out *A. B.* contended that the sale had destroyed the voluntary settlement, and that the persons claiming thereunder had no equity against the sale moneys, which must be treated as if the sale had been made by *A. B.* himself:—

Held, that the voluntary settlement was a complete disposition by the settlor of the proceeds of the sale of the estate in case the prior mortgagee should exercise his power, and that the volunteers under the settlement were entitled as against the settlor to the fund in Court.

PETITION for payment out of Court.

On the 29th of August, 1871, Sir *Harry Paul Burrard* mortgaged the *Walhampton* estate to *W. G. Mount* in fee simple in order to secure the sum of £5000, by an indenture which contained a power of sale, and the usual declaration that the mortgagee, his executors, administrators, and assigns, should out of the proceeds, in the first place, pay the costs of the sale, and in the next place, the moneys due on the security, and should then pay the surplus, if any, to the mortgagor, his heirs or assigns.

On the 11th of October, 1871, Sir *Harry Paul Burrard*, by a voluntary settlement, after reciting that he was desirous of making a settlement of the *Walhampton* estate, "subject to a mortgage for a sum of £5000 and interest made by an indenture

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dated the 29th day of August last," granted the same hereditaments "and all the estate, right, title, interest, claim, and demand of him the said Sir *H. P. Burrard* in, to, and upon the same premises," to certain grantees to uses to hold, subject to the said mortgage and to a power of raising £1500 for himself, to the use of himself for life, with remainder to his first and other sons successively in tail male, with divers remainders over; and this deed contained the usual covenants for title, quiet enjoyment, and further assurance. The settlement vested in certain trustees powers of sale and exchange and reinvestment in the ordinary form.

Sir *H. P. Burrard* subsequently in the year 1877 executed several mortgages in fee upon the *Walhampton* estate, and in the year 1878 he executed another mortgage upon other property, all of which became vested in the Petitioners.

In May, 1883, *W. G. Mount*, under the power of sale in his mortgage, sold the *Walhampton* estate, and after retainer and payment of the mortgage debt and all expenses he paid into Court under the *Trustee Relief Act*, the balance of the purchase-money, which amounted to upwards of £41,000.

The questions arising upon the petition were: first, whether the Petitioners, who claimed under the mortgages created over the *Walhampton* estate by Sir *H. P. Burrard* after the date of the voluntary settlement, were entitled to consolidate their subsequent mortgage upon Sir *H. P. Burrard's* other property (which had turned out insufficient in value to secure the amount advanced upon it) with their mortgages upon the *Walhampton* estate so as to obtain payment of that mortgage debt out of the fund in Court? and secondly, whether the persons claiming under the voluntary settlement were, or Sir *H. P. Burrard* himself was, entitled to the residue of the fund after payment of the mortgages?

The first question only was argued upon the first day of the hearing.

Hastings, Q.C., and *Darley*, for the Petitioners:—

We are entitled to consolidate, because Sir *H. P. Burrard*, notwithstanding his voluntary settlement, could create a subsequent

mortgage in fee upon the *Walhampton* estate giving to the mortgagee thereunder all his own equitable rights, including the right to redeem and to consolidate. The statute of 27 Eliz. c. 4, enabled the mortgagor to sweep away the voluntary settlement in favour of a subsequent purchaser for value, and so to create interests in the estate subject to the settlement either by mortgage or sale as if he were absolute owner.

[They referred to *Jennings* v. *Jordan* (1).]

W. Pearson, Q.C., and *Daw*, for persons claiming under the voluntary settlement, *contrà*.

Rawlinson, for *W. G. Mount*.

Farwell, for Sir *H. P. Burrard*.

Kekewich, Q.C., and *Leverson*, for other parties.

KAY, J.:—

I consider the claim for consolidation on the part of the mortgagees to be utterly unfounded. It is true that the voluntary settlement is void as against the subsequent mortgagee to the extent of the mortgage. But because that mortgagee afterwards obtains from the mortgagor another security is he to be allowed to consolidate his two securities, so as to throw on the estate, subject to the settlement, any part of the sum which may be owing to him beyond that originally charged thereon? In my opinion he clearly cannot do so. The statute of *Elizabeth* gives him no such power. It makes a voluntary settlement fraudulent and void as against a subsequent purchaser, but it only makes it void to the extent of the purchaser's interest therein. No authority has been cited which bears out the contention of the mortgagees in this case, and I therefore hold that the settled estate is liable only to the extent of the sums charged thereon by the mortgages expressly affecting it.

March 21. The second question was now argued.

(1) 6 App. Cas. 698.

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W. Pearson, Q.C., and *Daw*, for the persons claiming under the voluntary settlement, were stopped by the Court.

Farwell, for Sir *H. P. Burrard*:—

The persons interested under the settlement are mere volunteers, and if the settlor had himself afterwards sold the settled property they would have had no title to the purchase-moneys: *Pulvertoft* v. *Pulvertoft* (1).

The sale by *Mount*, the mortgagee, under the power in his mortgage, had the same effect. That sale entirely destroyed the voluntary settlement. It took away its subject-matter. The volunteers claiming thereunder accordingly have no equity against the fund in Court, which must be treated as though the sale had been made by the settlor himself for valuable consideration subsequently to the voluntary settlement: *Evelyn* v. *Templar* (2); *Daking* v. *Whimper* (3); *Dening* v. *Ware* (4).

It is a principle of the Court to withhold its assistance from a volunteer, whether claiming under a contract, a covenant, or a settlement: *Jefferys* v. *Jefferys* (5).

[*Hales* v. *Cox* (6) was also referred to.]

Rawlinson, for *W. G. Mount*.

Kekewich, Q.C., and *Leverson*, for other parties.

Pearson, in reply, referred to *Croker* v. *Martin* (7).

March 26. KAY, J. (after stating the facts):—

If the residue of the sale moneys is now to be considered as personal estate, it will no longer be subject to 27 Eliz. c. 4, which applies to lands, tenements, or other hereditaments only.

It is argued on behalf of the settlor that the sale entirely destroyed the settlement, and that the persons entitled under the settlement have no equity against the proceeds of sale which must be treated, for this purpose, precisely as though the sale had

(1) 18 Ves. 84, 91.
(2) 2 Bro. C. C. 148.
(3) 26 Beav. 568.
(4) 22 Beav. 184.
(5) Cr. & Ph. 138.
(6) 32 Beav. 118.
(7) 1 Bli. (N.S.) 573.

been made subsequently to the settlement by the settlor himself, in which case *Daking* v. *Whimper* (1) is a direct authority that the proceeds of sale could not be treated as being subject to the trusts of the settlement.

But suppose a donor having nothing but a share of the proceeds of certain real estate which was subject to a power of sale vested in another person were to grant by deed all his interest in that real estate to a volunteer, and that subsequently the power of sale was exercised. I apprehend that his share of the proceeds would, before the sale, be correctly described as an interest in the hereditaments, and that such a grant would be perfectly good and valid as between him and the grantee. At the time of making the grant it was as complete a transfer of his interest as he was capable of effecting, and this upon the authority of *Kekewich* v. *Manning* (2) and *Donaldson* v. *Donaldson* (3) is binding although voluntary.

The question, therefore, seems to be whether the voluntary deed in this case was or not a disposition of the proceeds of sale in case the prior mortgagee should exercise his power of sale. By that deed the settlor in terms granted all his interest in these hereditaments. The deed recites the mortgage, and his interest in the hereditaments must include what might remain of the proceeds of sale under the mortgagee's power of sale, after satisfying the mortgage debt. I am, therefore, not able to see any difference in principle between this case and that which I have supposed.

Evelyn v. *Templar* (4), which is relied on, is not any authority against this view. There the bill was filed by persons claiming under a voluntary settlement against a subsequent purchaser, who had paid his purchase-money to the settlor, seeking to make him pay it over again. But the settlement contained a power for the settlor to revoke the settlement and sell the property, and a covenant by him that the proceeds should be paid to the trustees of the settlement. The purchaser, therefore, as the settlement was revoked, was perfectly right in paying the proceeds to the settlor. The deed contemplated that any purchaser would do

(1) 26 Beav. 568.
(2) 1 D. M. & G. 176.
(3) Kay, 711.
(4) 2 Bro. C. C. 148.

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so. The covenant being voluntary could not be enforced in equity by way of specific performance, and the Plaintiff, therefore, was not entitled to relief. Damages might have been obtained at law against the settlor for breach of the covenant, but he was dead insolvent.

If the settlement had not contained a power of revocation, as the sale was an absolute sale of the property, the case would have been like *Daking* v. *Whimper* (1).

The truth is that the statute 27 Eliz. c. 4, does not affect the question which has to be decided as to the surplus proceeds in this case. The sale was not by the settlor nor under any power reserved to him. It was under a power given to the mortgagee, paramount to the voluntary settlement, which was expressly made subject to it. If the settlement was an effectual disposition of the surplus proceeds no other question arises. I am of opinion that it effected as complete a disposition of such proceeds as the settlor at the time was capable of making, and upon this ground I must hold that the persons interested under that settlement have a right to the surplus proceeds as against the settlor.

In *Dolphin* v. *Aylward* (2), Lord *Hatherley* affirmed the well established doctrine that the settlor can in no wise invalidate such a deed, except by a subsequent disposition by himself for value, and to the extent of that disposition, and in *Hales* v. *Cox* (3) that doctrine was carried so far that it was held that persons claiming under such a settlement had a right to marshall the mortgagees of the estate under a subsequent mortgage which included other property.

In *Donaldson* v. *Donaldson* (4), Lord *Hatherley* said, "If the title is so far complete that this Court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him."

This is no more than a statement of what was actually done in *Kekewich* v. *Manning* (5), where the assignor of an equitable reversionary interest, being also one of two trustees of the fund

(1) 26 Beav. 568.
(2) Law Rep. 4 H. L. 486, 499.
(3) 32 Beav. 118.
(4) Kay, 718.
(5) 1 D. M. & G. 176.

at the date of the assignment, subsequently became, by the death of the co-trustee, sole surviving trustee of the fund, and the assignment, being as complete as it could be made at the time, was enforced against such surviving trustee.

Whether the mortgagee in this case be considered a trustee, or, as I think, more properly, a debtor, who, as between the contending parties, is a stakeholder, I think the grant ought to be enforced against him, and the money having been paid into Court by him, I am bound to hold that it belongs to the persons entitled under the settlement.

Solicitors: *Dimond & Son; Dunster; Hume, Bird, & Eldridge.*

W. W. K.

CHITTY, J.

1884

March 4, 5, 6, 10

MOUSON & CO. *v.* BOEHM.

[1882 M. 2434.]

Trade-mark—Registration—Non-user—Abandonment.

In order to deprive a manufacturer of his right to a trade-mark, the use of which has been practically given up for a period of five years, mere discontinuance of user for lack of demand, though coupled with non-registration, and non-assertion of any right, is not enough: there must be evidence of distinct intention to abandon.

In 1874, *A.*, a German soap manufacturer, adopted a trade-mark for a particular kind of soap, which for about two years was manufactured and sent to this country in large quantities for exportation to *Australia*, but from 1876 until 1882 the manufacture and sale of soap thus marked fell off, until it practically ceased, and the existence of the particular mark was, in May, 1882, forgotten by *A.*

In 1880, *B.*, a manufacturer of soap in the same part of *Germany*, adopted, in complete ignorance of *A.'s* mark, a precisely similar mark for soap sent to this country for exportation to *Australia*, and in August, 1880, he registered his mark under the *Trade-marks Acts* in this country.

In July, 1882, after the commencement of proceedings by *B.* to restrain an infringement of his registered trade-mark by *A.*, *A.* applied for registration of his mark of 1874.

Upon application (1) by *B.* to restrain the infringement of his trade-mark; (2) by *A.* to have his trade-mark registered; (3) by *A.* to have *B.'s* trade-mark removed from the register:—

Held (1), that mere non-user by *A.* of his mark between 1876 and 1882, though coupled with non-registration, did not, having regard to the fact that he had not ceased to carry on his business, and had not broken up the mould, and that a number indicating soap thus marked was retained on his price lists, did not amount to an abandonment by *A.* of the mark, so as to give *B.* any exclusive right to his registered mark.

(2.) That the existence upon the register of *B.'s* mark did not prevent the Court from granting leave for the registration of *A.'s* mark.

(3.) That previous *bonâ fide* registration of *B.'s* mark in ignorance of any claim by *A.*, followed by large dealings under that mark, prevented *A.*, after the lapse of two years, from getting *B.'s* mark expunged from the register.

THIS case came before the Court upon three applications:—

1. By the Plaintiffs, Messrs. *Mouson & Co.*, for an injunction to restrain the Defendant *Boehm* from infringing the Plaintiffs' registered trade-mark for soap, consisting of a kangaroo, with the words "The Colonial" inclosed within an elliptical band or ring.

2. By the Defendant *Boehm*, under the *Trade-marks Act*, 1875, for registration of his alleged trade-mark consisting also of a kangaroo with the word "Colonial" similarly inclosed.

3. By the Defendant, also under the *Trade-marks Act*, to rectify the trade-marks register by removing therefrom the Plaintiffs' trade-mark.

It appeared from the evidence that in 1874 the Defendant *Boehm*, who carried on business as a soap manufacturer at *Offenbach*, near *Frankfort-on-Main*, invented, on the suggestion of his *London* agents, Messrs. *Weintraud, Joyce, & Co.*, a trade-mark for soap intended to be exported to the English colonies. This trade-mark, which consisted of a kangaroo with the word "Colonial" inclosed in a ring or frame-work, was almost identical with that afterwards (in 1880) invented and adopted by the Plaintiffs. In 1874 a considerable quantity of soap thus marked (from 180 to 200 gross), was manufactured by the Defendant, and consigned by him, with price lists containing references by number to soap marked with his trade-mark under the name "Colonial," to *Weintraud & Joyce* for exportation to *Australia*, *New Zealand*, and *South Africa*, but from 1876 until 1882 the manufacture practically ceased, and the sale, which down to 1876 had been considerable, diminished to $2\frac{3}{4}$ gross in 1877, $3\frac{3}{4}$ gross in 1878, $\frac{1}{4}$ gross in 1879, none in 1880, 1 gross in 1881, while on the 31st of May, 1882, after proceedings had been threatened by the Plaintiffs, 12 gross were manufactured and sold.

The Plaintiffs were soap manufacturers and wholesale perfumers at *Frankfort-on-Main*, also carrying on a large business with the English colonies through their *London* agents, Messrs. *Oppenheimer & Co.* In August, 1880, at the suggestion and with the assistance of *Oppenheimer & Co.*, they invented a trade-mark for soap especially intended for exportation to the colonies, which consisted of a kangaroo with the words "The Colonial" inclosed in an oval frame. Application was made on the 4th of August, 1880, for registration of this mark, and in November following the mark was registered as a trade-mark in *England*. The soap thus marked was sent over to Messrs. *Oppenheimer* in very large quantities, amounting to between 19,000 and 20,000 dozen tablets, and by them exported to *Australia*, *New Zealand*, and *South*

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Africa. It was also exhibited by the Plaintiffs at the *Frankfort Exhibition* of 1881, and in May, 1882, the mark was registered in *Germany.* In April, 1882, Messrs. *Oppenheimer's* traveller, on calling upon *Morum Brothers,* a firm in the City, and shewing them a sample of the Plaintiffs' "Kangaroo Colonial" soap, was told that it was not new, as they (*Morum Brothers*) had shipped it for years, and had a tablet of it, which had been purchased in 1881, then by them. On inquiry, Messrs. *Oppenheimer* discovered that this tablet had been manufactured by the Defendant *Boehm,* and considering that it was an imitation of the Plaintiffs' trade-mark, they instructed their solicitors, Messrs. *Emanuel & Simmonds,* to write to the Defendant. The solicitors thereupon (on the 24th of April, 1882) wrote to *Boehm,* calling his attention to his use of "the Colonial tablet, which is clearly an imitation of our client's trade-mark," and informing him that unless he gave an immediate undertaking to refrain from using further tablets of that kind, and to withdraw all soap "bearing the counterfeit mark," proceedings in respect of the infringement would be at once commenced. In answer to this letter the Defendant (who stated in his evidence that the effect of the word "Colonial" did not come back to his memory, but that if the letter had contained the word "kangaroo" he should certainly have recollected it, and answered in a different style) replied on the same day that he was much surprised at their letter, that he did not know Messrs. *Mouson & Co.'s* colonial tablets, nor did he ever think of imitating any other maker's trade-mark or designs, as his soap was known well enough, and requesting an explanation. On the same day the Defendant wrote from *London* to *Mouson* at *Frankfort* a letter of which the translation was as follows: "As you are well aware it is not my custom to imitate the old models of other makers, which I don't think at all necessary, as my marks are sufficiently introduced (*eingeführt*). Much less should I think of copying a trade-mark, as my goods go out with my own trade-mark. Your colonial tablet is not known to me, as I do not keep (?) (*führe*) any soap of this designation. I request you to give me an explanation whether the above summons came from you, or who was the cause." On the 26th of April the Defendant, with *Beck,* his *London* manager, called at the office of *Emanuel & Simmonds.*

On the tablet being shewn to him the Defendant did not appear to recognise it as one of his manufacture; he said he could not tell exactly if it was his make, but if it was it must have been made at least ten years (corrected in his examination to eight years) before, adding that he commenced the manufacture of soap like this fifteen years ago, and ceased to do so about ten years ago, because there was no market for the soap. In explanation of his letters and the statement made by him at this interview, the Defendant stated that the whole thing came upon him quite unexpectedly, that being in *London* at a distance from his books he did not know what to make of it, and that while quite certain that he had never imitated tablets which he knew did belong to the Plaintiffs he had quite forgotten the fact of his own mark of 1874. This was, however, shortly afterwards recalled to him by his agents, *Weintraud & Joyce*, who wrote calling his attention to the fact that the identical design was ordered to be made specially for them, and therefore the Plaintiffs' registration fell to the ground. "You will recollect our not finding it a success, the last ten or fifteen gross we had laid aside for private use, to which numbers of people can testify. From what you tell us the sample shewn to you must have been made by you years ago. Had the sale been important we should have advised you to take them to account for copying what belongs to you. Our advice is simply, should they trouble you again with letters, to refer them to us as your *London* agents, when we should not object to the trouble of opening their eyes."

Some further correspondence took place, in which *Boehm* called the Plaintiffs' attention to the fact of their having, unknowingly, he could only think, registered a tablet with the same name and design as that brought out by him ten or twelve years ago (which had quite slipped his memory), and stated that he should not hesitate to make again the piece in question if it was required, "as I brought it out a long time before you." In June, 1882, the writ was issued in the Plaintiffs' action claiming an injunction against the use by *Boehm* of what was alleged to be an infringement of the Plaintiffs' registered trade-mark.

On the 12th of July, 1882, *Boehm* applied to have his trade-mark (Kangaroo-Colonial) registered.

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Aston, Q.C., and *D. L. Alexander*, for the Plaintiffs:—

The Defendant must establish: 1. That he ever had a trade-mark which became known and acquired reputation in the trade as his distinctive mark; and 2. That such trade-mark was not abandoned, but kept alive. Unless he could have proved that "Kangaroo-Colonial" had become known in the market as indicating soap of his manufacture, he could not under the old law, before the Act of 1875, have obtained an injunction to restrain the use of a similar mark. There is not the slightest evidence that the Defendant's mark ever became known in the trade, or that it was ever asked for by customers: in fact, it is admitted that soap thus marked when sent to this country proved a failure, and remained unsold on the hands of the agents, so that there has been a positive discontinuance and waiver of any user from 1876 until 1882, during all which time there was practically no trade in soap bearing this mark; and in addition to this the Defendant, by his letters of April, 1882, shews that he had totally forgotten this trade-mark which he now claims. If he forgot it, are we not entitled to say that the trade has also forgotten it, and that by an absolute cessation of user since 1876 the Plaintiff has lost any inchoate right, which he failed to perfect, to the exclusive use of the mark. "The very life of a trade-mark depends upon the promptitude with which it is vindicated:" *Orr Ewing & Co.* v. *Johnston & Co.* (1); but so far from taking any steps to vindicate his mark, the Defendant, who was affected with notice in 1880 that the Plaintiff claimed, asserted and had obtained the right to use this mark, which was adopted by him *bonâ fide* and in entire ignorance of any prior claim to it by the Defendant, has waived his right if he ever had any. Then we rely on the absence of registration from 1875 until 1882, when the Defendant applied, not as in itself amounting to forfeiture of the right, but as one of the very material *indicia* of abandonment. We submit that the Plaintiffs, who *bonâ fide* applied for and obtained registration of their mark in 1881, are entitled to restrain the Defendant from now setting up a similar mark which had been long before abandoned, and that the Defendant's application to register such mark ought to be refused.

(1) 13 Ch. D. 434; 7 App. Cas. 219.

Whitehorne, Q.C., and *Chadwyck-Healey*, for the Defendant:—

We shall prove that we invented our trade-mark in 1874; that there has been continuous, or almost continuous user ever since; that it has never been formally abandoned, and that it is still connected with the name and class of business carried on by the Defendant. With respect to abandonment, if I allow another person to carry on business and to use in his business my trade-mark, with knowledge on my part that he is so doing, that, we admit, might be evidence of abandonment. But until April, 1882, the Defendant had no knowledge whatever that the Plaintiffs were using this mark. If, again, the market be sufficiently stocked with goods of my mark in order to meet the requirements of the trade for some years, why must I go on manufacturing and issuing goods of that description at a loss? As was said in *Weldon* v. *Dicks* (1) (a copyright case): "The author might very well have said, 'I do not think it will answer my purpose to republish this at present; it is out of print, but in due time I will consider whether it is worth my while to republish it.' When does a man lose his right? .... Does he lose his right because he does not republish in one, two, three, or ten years? When does it cease? I have not got a satisfactory answer to that question," per *Malins*, V.C. (2); *Morris* v. *Ashbee* (3).

[CHITTY, J.:—There is no analogy to copyright. The Act gives a man copyright for a term of forty years. Under the *Prescription Act* a man must exercise a right, which he seeks to establish, once every year, but that deals with the acquisition, not the abandonment, of a right.]

Mere suspension of the exercise of a right without evidence of an intention to abandon it, is not sufficient to destroy the right: *Crossley* v. *Lightowler* (4). So in this case, although the sale between 1876 and 1881 was very limited, it was never actually given up, still less is there any evidence of intention to abandon the use of the mark, which the Defendant is entitled to have placed on the register. The Plaintiffs' device is a merely colourable imitation of our mark, and any reputation acquired by his soap

(1) 10 Ch. D. 247.
(2) Ibid. 261.
(3) Law Rep. 7 Eq. 34.
(4) Ibid. 2 Ch. 478.

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under that mark is due to the fact that Defendant's soaps were known and appreciated in the colonies before those of the Plaintiffs were introduced.

Aston, in reply.

CHITTY, J., after stating the facts as proved in evidence, and observing that he was satisfied that the Defendant *Boehm* had forgotten the facts proved on his part in evidence—not only because his testimony was given very well, but because the surrounding facts seemed to shew it; amongst others, the circumstance that being a manufacturer on a very large scale he had somewhere about 740 patterns of different soaps—proceeded as follows:—

Now the result of these facts appears to me to be this, that although there was a considerable trade on Mr. *Boehm's* part in the inception of this business, it fell off, and the trade after 1876, whether I regard it as a manufacture or as a sale of manufactured goods by *Weintraud, Joyce, & Co.*, was comparatively small. So little, indeed, had it been of late years, that it justifies the observation that that was the reason why he had forgotten it. But it appears to me that Mr. *Boehm* has established, first, that he did acquire a trade-mark which became his property in connection with toilet soap, and then the question arises on that whether he ever abandoned it. That is undoubtedly a question of fact. There is nothing in the new Act or the old Act which bears on the point with any definiteness. There was rule 34 under the *Trade-marks Act*, 1875 (repealed by the Act of 1883), which does not appear to be embodied in the new rules: "The Court may, on the application of any person aggrieved, remove any trade-mark from the register, on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor is not engaged in any business concerned in the goods within the same class as the goods with respect to which a trade-mark is registered." Ceasing, therefore, to carry on business for a period of five years under that rule, would have been a ground for removing the trade-mark from the register. That gives some indication of what was considered proper with regard to this subject, but it has

very little bearing on the case before me, because that rule, as I understand it, is now repealed.

Now, on the question of abandonment, it appears to me that intention to abandon must be shewn. There are some analogous cases in law, such as the case of an easement. Mere non-user of an easement, like a right to foul a stream for a considerable period of years, would not be sufficient to prove an intention to abandon it. But if, as in the case of *Crossley* v. *Lightowler* (1), the person who was entitled to such an easement as fouling a stream, has not only ceased from using it for a period of twenty years, but at the same time has allowed the mill in respect of which the right is claimed, to fall into ruins, or has pulled it down, the Court would infer, from the circumstances, an intention to abandon the right which had been previously exercised. With regard to goods, they may be abandoned where there is an intention, and the law with regard to larceny is that a man is not guilty of larceny if he finds goods under circumstances from which it may be reasonable to infer that the owner of the goods intended to abandon the property.

In substance, therefore, the question of abandonment is one of intention to be inferred from the facts of the particular case.

Now ought I to infer it in the case before me? Mr. *Boehm* retained that mark, he did not break up the moulds according to the practice which he stated he adopted when he did intend to give up any particular mark. He did not even erase the trade-mark from his books, and there were persons in the market who got the goods from him who were endeavouring to effect sales, and he by sending over those price lists to the number of 1200 during the years spoken to was himself endeavouring to effect sales.

Now an important point also is, that he did not give up the business to which the trade-mark belonged. It is quite true, as Mr. *Aston* said, that he never attempted to register, but that is only an element, as Mr. *Aston* admitted, to be taken into consideration with the other facts. Registration of the trade-mark is no doubt a condition precedent to suing. I need not mention the subordinate case of refusal to register, but speaking generally

(1) Law Rep. 2 Ch. 478.

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it is a condition precedent to suing. In that respect it is more like a copyright, where you have the right, although you cannot sue without registering. Now if this case had stood on the interview between Mr. *Boehm* and Mr. *Simmonds* I should have come to the conclusion that Mr. *Boehm* could not have set up his trade-mark as against Mr. *Mouson*, because he would have then submitted to a legal demand, and that would be, between him and Mr. *Mouson*, an abandonment of his trade-mark. But the effect of that interview is displaced by Mr. *Boehm's* letter of the 3rd of May following, in which he definitely asserted his claim, and said he would make use of his trade-mark if he should think fit. Upon that of course an action might at once have been maintained, and therefore Mr. *Mouson* cannot complain that he was misled in the result by what took place at the interview.

Now it was said that user is the life of a trade-mark, and non-user the death of it. Those of course are metaphorical expressions, which must be received with caution. No doubt, apart from registration (which the present Act makes equivalent to user), a trade-mark was acquired by user, and a very short time has been held sufficient, as in the case of the Anatolia Liquorice, *McAndrew* v. *Bassett* (1), where a man acquired by user and reputation in the market the right to use in connection with liquorice the name of a province. Here it appears to me there was no absolute non-user for any sufficient time, taken in connection with all the circumstances, to shew an intention to abandon. A man who has a trade-mark may properly have regard to the state of the market and the demand for the goods; it would be absurd to suppose he lost his trade-mark by not putting more goods on the market when it was glutted. There was some user, and the result therefore is that *Boehm* has not abandoned his trade-mark. The trade-mark was not of very great value to him (and on that I will make an observation presently), still I think it was his trade-mark before, and he has not lost it by abandonment. Some argument was put forward that he had acquiesced in *Mouson's* trade-mark. If that had been proved, that would have been a complete answer to *Boehm's* defence. One of the modes in which it was attempted to fix

(1) 4 D. J. & S. 380.

Boehm with knowledge which would be required to establish a case of acquiescence, was that Mr. *Mouson* had, as he undoubtedly publicly did, exhibited his goods in boxes, and with labels and so forth on them, at the *Frankfort Exhibition* in 1881. I am satisfied again on the evidence of Mr. *Boehm* that what he stated was correct, that although he looked at the stall and took some interest in it, that he did not observe the things. It is quite possible, and, as I said, Mr. *Boehm* gave his evidence very well, though perhaps with a little more energy than is usual in an Englishman, still I do not think I ought to make, and do not make, on that account, or any other account, the slightest deduction from the value of his testimony; and I think he and his witnesses truly stated that he and they did not see Mr. *Mouson's* soaps which were exhibited at *Frankfort*. It follows, therefore, that knowledge of *Mouson's* trade and trade-mark cannot be attributed to *Boehm*, and no case of acquiescence is made out. That really disposes of the question of injunction, and I think *Mouson* is not entitled to an injunction.

Then comes *Boehm's* application to register: that appears to follow from what I have said. The present Act shews that the principle adopted by the late Master of the Rolls as to concurrent trade-marks is the right one, and that there may be on the register, up to the number of three, persons entitled by independent user to a trade-mark. It follows therefore that *Boehm* is entitled to register his trade-mark.

Then the last point is the application to expunge *Mouson's* mark from the register. That was practically given up by Mr. *Whitehorne* at the Bar. *Mouson* has been two years on the register, he has acquired title *bonâ fide* and independently, and he has enjoyed during those two years a considerable trade, in fact a greater trade than *Boehm* has done during the eight years that preceded 1882, and it seems to me that I ought therefore to refuse the application to expunge *Mouson's* trade-mark, which I do. The case of *In re Powell, In re Pratt* (before the late Master of the Rolls, on the 12th of January, 1878 (1)), is an authority for the proposition that there may be, as I have already stated, two

(1) Seb. Dig. Trade-Mark Cases, 357.

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identical trade-marks on the register when the parties have used the mark independently and each party claims *bonâ fide*.

That disposes of all matters except the important one of costs, and if I acted strictly in this case the order would be that in regard to those two applications under the *Trade-marks Act* each party—the party who fails—should pay the costs of the other with a set-off. But that leaves the costs of the action, and the strict rule would be no doubt to order *Mouson* to pay the costs of the action. That would lead to the apportionment of the fees on the briefs and the apportionment of the evidence which has been taken on all three applications. I think in this case I ought to depart from the usual strict rule with regard to ordering *Mouson* to pay any costs, because I am satisfied that *Boehm* attached very little importance to this trade-mark, and it was rather because he was attacked that he set up the trade-mark and has succeeded. Justice, I think, does not require that I should order *Mouson* to pay the costs of the action. It would only be a comparatively small portion of the costs, and seeing the honest way in which *Mouson* acted, the considerable trade which he himself acquired in the trade-mark, and seeing that to a large extent he loses the benefit of it by *Boehm* going on the register—taking all the facts into consideration, I think I ought to say the action is dismissed without costs, as I do. The application to expunge is dismissed without costs, and *Boehm's* application to have his mark placed on the register is acceded to without costs.

Solicitors: *Emanuel & Simmonds; Munns & Longden.*

F. G. A. W.

In re ANDERSON'S TRADE-MARK.

CHITTY, J.

1884

March 17.

Trade-mark—Registration—Words Publici Juris—Trade-marks Act, 1875 (38 & 39 *Vict. c.* 91), *ss.* 6, 10.

A term which by judicial decision has become open to the trade as the proper description of an article made in accordance with the recipe of the original inventor, and is therefore *publici juris*, cannot be registered as a trade-mark either alone or in combination with a portrait of the original inventor; and such portrait is not a sufficiently "distinctive device" within the *Trade-marks Act*, 1875, s. 10, to be capable of registration as a trade-mark *per se*.

THIS case came before the Court upon an adjourned summons taken out by the *Liebig's Extract of Meat Company* (*Limited*) that the Registrar might be directed to refuse the registration, upon an application of *Robert William Anderson*, of a trade-mark for his extract of meat.

The company was formed in 1865 for the purpose of manufacturing and selling an extract of meat prepared according to the formula of the late Baron *Justus von Liebig*, and authenticated by his signature. In 1866 Baron *von Liebig* executed a power of attorney granting to the company the sole and exclusive right to use the name "*Extractum carnis Liebig*," or to use his name in any other manner which they might from time to time see fit in naming and indicating the *Extractum carnis* manufactured according to his method; and he also by agreement with the company of the same date granted to them the full use and benefit of the invention, and, confirming the power of attorney, agreed that for ten years from 1866 the analysis of all extracts of meat arriving at the company's general depôt should be under the immediate control of himself and his delegate Dr. *M. Pettenkofer*. Upon the death of Baron *Justus von Liebig*, in 1873, the personal connection of the company with the Baron and his representatives was continued by the analysis and certificate of Dr. *Pettenkofer* and Baron *Hermann von Liebig*, and the wrapper on their part contained the following words: "Caution. Every genuine jar bears the certificate label round the capsule, the above two signatures of Professor *Max von Pettenkofer* and

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Baron *H. von Liebig*, and across the trade-mark" (which consisted of an ox and a sheep) "label, a *fac-simile* in blue, of the signature of the inventor, the late Baron *Justus von Liebig*."

In 1866 the company had filed a bill against Messrs. *Allen & Hanbury*, for the purpose of restraining the use by them of the words "*Liebig's Extract of Meat*" or any other title of which the word "*Liebig*" formed a part. The case came before the late Lord *Hatherley*, then Vice-Chancellor *Wood*, who held that the Plaintiff company were not entitled to an injunction to restrain the sale of the article under the title "*Liebig's Extract of Meat*," which, in his opinion, had become "common property," and a commercial article known under that name in the market which had ceased to be the distinctive mark of the manufacture of *Liebig*. [See *Liebig's Extract of Meat Company* v. *Hanbury* (1).]

In 1881, *Anderson*, who had been secretary of the *Australian Meat (or Ramornie) Company*, commenced the business of selling *Liebig's* Extract of Meat in pots labelled "Baron *Liebig's* Extract, guaranteed by *R. W. Anderson*," with a picture of Baron *Justus von Liebig* taken from a photograph. The Plaintiff company, complaining that the use of the word "Baron" and of the photograph was unauthorized and calculated to mislead the public into the belief that when they purchased *Anderson's* extract they were purchasing extract manufactured by Baron *Liebig*, or under his personal supervision: in other words, extract of meat manufactured by the Plaintiff company, brought an action against *Anderson* and another for the purpose of restraining the use of this label.

The case was tried before Mr. Justice *Field*, sitting for Mr. Justice *Kay*, and on the 8th of November, 1882, his Lordship being of opinion that the Plaintiff company had not made out the case which they were bound to establish, not merely of fraud, but of unconscientious and continued fraud, gave judgment for the Defendant. This decision was affirmed by the Court of Appeal on the 22nd of November, 1883, their Lordships holding that the addition by the Defendant of the word "Baron" and the portrait of the person who had invented the process and was properly referred to as the inventor in describing the article, to that

(1) 17 L. T. (N.S.) 298.

which had become known as the proper description of extract of meat made in accordance with Baron *Liebig's* recipe, and was common property, did not amount to a representation that what he sold was made by the Plaintiff company which was alone connected personally with Baron *Liebig*; and, further, that there was no evidence that the expression "Brand Baron *Liebig*" used by him had in any way deceived the public, or made people believe that the goods which they were purchasing from the Defendant were the goods of the Plaintiff company.

Pending this litigation, but before the trial of the action, *Anderson* had applied for the registration of a trade-mark consisting of the portrait of the late Baron *Liebig* with the words "Brand" at the top, and "Baron *Liebig*" at the bottom.

The Plaintiff company thereupon gave notice on the 10th of February, 1882, that they opposed the registration of the advertised trade-mark.

As originally filed the grounds of opposition were in effect that the proposed trade-mark was calculated and intended to deceive, and had been deliberately and fraudulently adopted with the intention of deceiving the trade and the public into the belief that the extract of meat and goods marked with it were manufactured, prepared, and sold by the *Liebig's Extract of Meat Company*, and that proceedings were then pending at the suit of the company to restrain the applicant from using such trade-mark.

These grounds of opposition having been disposed of by the decision of Mr. Justice *Field* (sitting for Mr. Justice *Kay*), on the 8th of November, 1882, which was affirmed by the Court of Appeal on the 22nd of November, 1883, the amended notice of opposition on which alone the case was now argued, stated "that even if the applicant is entitled (which the company deny) to use the word "Baron" and the photograph or likeness of the late Baron *Liebig*, he is not entitled to the exclusive use thereof, or to any trade-mark therein."

Rigby, Q.C., *Romer*, Q.C., and *Northmore Lawrence*, for the *Liebig Company*:—

We submit that *Anderson* is not entitled to register his proposed trade-mark, or any part of it. Although it has been held

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that he cannot be restrained from calling his extract of meat *Liebig's*, or Baron *Liebig's* Extract of Meat, he cannot maintain that he has any exclusive right to these words such as would entitle him to protection for their exclusive use: *Trade-marks Act*, 1875, s. 6; *Trade-marks Act*, 1883, s. 73; these words being common property, and merely descriptive of quality, and as such incapable of registration as a trade-mark: *In re Saunion* (*Anglo-Portugo Oysters*) (1); *In re Brandreth* (*Porous Plasters*) (2); *In re Palmer's Trade-mark* (3). Then as to the portrait: *Anderson* seeks to have the exclusive right to Baron *Liebig's* photograph or portrait secured to him so that no one else shall ever hereafter use in reference to Baron *Liebig's* Extract of Meat Baron *Liebig's* portrait. On what principle can he claim as against all the world any exclusive right by registration as a trade-mark of the name or the portrait, or the combination of the name and the portrait?

Ince, Q.C., and *H. Burton Buckley*, for *Anderson*:—

If, as has been held, the use of the words which we seek to register as part of our trade-mark, is not a wrongful act on our part, we are entitled under the *Trade-marks Act*, 1883, to register them in combination with the portrait of Baron *Liebig*, which does not in any way describe the goods to which it is attached, but is a quite distinctive device which no one has ever before applied to the subject-matter of the trade and as much a matter of fancy as any wholly irrelevant picture or device which we may be minded to adopt. The meaning of the *Trade-marks Act*, 1875, s. 6, that "it shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a Court of Equity" is not that only such words can be registered as those of which the exclusive use would be protected by a Court of Equity, but that you cannot register words for the exclusive use of which a Court of Equity would refuse protection.

(1) Seb. Dig. of Trade-Mark Cases, 381.

(2) Seb. Dig. of Trade-Mark Cases, 382.

(3) 24 Ch. D. 504.

[CHITTY, J., referred to *In re Leonardt* (1); *In re Barrow's Trade-marks* (2).

Romer, in reply.

At the conclusion of the argument, *Ince*, Q.C., mentioned *In re Simpson, Davies, & Sons' Trade-mark* (3), as shewing that the application by the company to restrain the proposed registration was irregular, and that the proper course, as there pointed out by *Jessel*, M.R., was for the person seeking to register to take out a summons for leave to register; but Mr. Justice *Chitty* held that as the argument had proceeded on the merits any irregularity in the form of the proceedings had been waived by *Anderson's* counsel, and that the point could not then be raised.

CHITTY, J.:—

This is an application by Mr. *Anderson* seeking to register, in reference to goods described as "Extract of Meat," a trade-mark which was not in use before 1875, and which for the purposes of the application must be treated as what is commonly termed a new mark, consisting of a photograph and "Baron *Liebig*" underneath, and it is Mr. *Anderson's* case that the portrait or photograph is a photograph of Baron *Liebig*, the well-known inventor of the article commonly known in the market as "Extract of Meat." There has been a litigation between the opponents who are *The Liebig's Extract of Meat Company* and Mr. *Anderson*. The issues which arose in that action have been tried before Mr. Justice *Field*, and were carried to the Court of Appeal; and the argument before me has proceeded, both as to fact and as to law, upon the judgment of those learned Judges, and particularly the judgments of the Court of Appeal. The facts are accepted as laid down by the Court of Appeal on both sides, and I have not been referred to the evidence in any way, nor indeed after their findings would it have been proper to refer me to the evidence in detail. The law of course, so far as it is laid down by the Court of Appeal, is binding on me, and the real question is to what extent the

(1) Seb. Dig. of Trade-Mark Cases, 373.

(2) 5 Ch. D. 353.

(3) 15 Ch. D. 525.

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law so laid down is applicable to the case which I have to try; because it does not follow that by reason of the *Liebig Company* having failed in their suit as against Mr. *Anderson*, Mr. *Anderson* should succeed upon the present occasion. Now, some points are quite clear. The term "*Liebig*," with reference to extract of meat, is a term open to the use of any person engaged in this trade. The word has become with reference to extract of meat merely a descriptive word describing the designation of the goods, and the Court of Appeal has decided that the addition of the word "Baron" makes no difference. On the question of fact, and apparently thinking the case was one of some little difficulty, the Court of Appeal has decided that the whole of this so-called trade-mark of Mr. *Anderson* is not open to objection on the part of the company on the ground that it is an assertion of any personal connection between Mr. *Anderson* and Baron *Liebig*. The company claim a special connection with the Baron and his family, and the Court of Appeal, as well as Mr. Justice *Field*, held that there was no representation to be found in this so called trade-mark as a whole which entitled the company to say that the Defendant is asserting in substance that he possesses the same connection with the Baron that they do. The point which I have now to decide appears to be this. Mr. *Anderson* proposes to register this mark as a whole. He does not propose to register particular parts. It is a mark which consists of a photograph and the words "Brand Baron *Liebig*."

Now, taking the parts of this so-called trade-mark and dealing with them separately, it is clear to my mind that the words "Brand Baron *Liebig*" are only common terms, and that if Mr. *Anderson* was allowed to register these words as part of his trade-mark he could then say, "I have the exclusive right to use these words, and any person who was then in the market is infringing my trade-mark;" and at the end of five years, Mr. *Anderson* would be entitled to say, "I have now acquired an absolute and exclusive title to the use of these words." It is hardly necessary to say that Mr. *Anderson* ought not to be permitted to register those words as part of his trade-mark.

The application falls under the Act (38 & 39 Vict. c. 91) which is now repealed, sect. 6 of which enacts that it shall not be lawful

to register as part of or in combination with a trade-mark any words, the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be entitled to protection in a Court of Equity, or any scandalous design. It appears to me that the words "or otherwise" are sufficient to exclude the registration as part of a trade-mark of words which are merely descriptive of the article, whether they are merely descriptive from their nature or whether they have become descriptive by the course of the trade and in the market. I hold therefore that I should be conferring on Mr. *Anderson* a monopoly which he is not entitled to if I allowed him to use the words "Brand Baron *Liebig*." I know the practice has been in considering cases of this kind to allow sometimes—and I have known it done by the late Master of the Rolls—a portion of the trade-mark, the whole of which is sought to be registered, to be registered either with or without disclaimer, sometimes allowing the whole to go with a disclaimer and sometimes allowing the material part, and striking out a certain portion which the late Master of the Rolls considered ought not to be registered. But that has been done in cases where the words have not formed a material or essential part of the thing proposed to be registered, and it seems that in the case before me the words "Brand Baron *Liebig*" are really the most essential parts of this proposed trade-mark, and if I have a discretion, as I think I have, considering that I ought not to allow the part "Brand Baron *Liebig*" to be registered, I think that in the exercise of such discretion I ought not to allow any part of the proposed trade-mark to be registered; in other words, I reject it as a whole. That being so, it does not become to my mind so important that I should state my opinion with reference to the photograph, but I think it right that I should do so. It appears to me from the judgment of the Court of Appeal, and particularly from what was said by Lord Justice *Cotton*, that it is a common practice for those engaged in trade to place a photograph of the inventor on the particular article to shew that he is the inventor, or to shew in the particular case that the article is made according to his invention, and, in this particular case before the Court of Appeal, that he was the inventor of the article that was sold. I think, having regard to that practice, that I should be doing the

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trade an injustice if I allowed one man to take to himself that which appears to be common to the trade, and is a common practice with the trade, viz., to take a photograph of the inventor. This is admittedly on the evidence, as well as admittedly on mere inspection of the trade-mark, a photograph of the Baron; and although, according to the judgment of the Court of Appeal, the placing of the photograph on the article sold is not an assertion of any special or personal connection with the inventor, yet it appears to me that I should be erring if I allowed, under circumstances such as occur in this case, Mr. *Anderson* to register what is an admitted photograph of the Baron. It appears to me that that would not be a sufficiently distinctive device within the true meaning of the term used as a trade-mark. The result is therefore that I refuse the application. The company will have their costs of this application, except the costs occasioned by the charges of fraud which have failed, and such costs must be paid by the company with the usual set-off.

Solicitors: *W. A. Crump & Son; Fluæ, Son, & Co.*

F. G. A. W.

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1884

March 24, 25.

[1883 H. 164.]

Settlement—Power to appoint New Trustees—Alienation of his Interest by Donee of Power—Subsequent Exercise of Power—Consent of Alienees.

A power to appoint new trustees may be exercised by a tenant for life after aliening his interest.

By a settlement, property partly real and partly personal, was conveyed to trustees upon trust to provide an annuity for *A.*, a widow, for life, and subject thereto for *B.*, her son, absolutely. The settlement provided that *B.*, during his life, and after his death the trustees or trustee for the time being, or the executors or administrators of the last acting trustee, should have power to appoint new trustees, if necessary. *B.* mortgaged his whole interest under the settlement, and the real estate (subject to *A.*'s annuity) was sold by the mortgagees to *C.* The personal estate was not sold by the mortgagees:—

Held, that *B.* could still exercise the power to appoint new trustees, without the consent of *C.*

By an indenture dated the 14th of July, 1862, *Benjamin Smith Jennings* conveyed to *Isaac Smith Bakes* and *William Bakes* four freehold cottages, and at the same time paid over to them a sum of £200, upon trust out of the rents and income of the four cottages and the £200 to pay an annuity of £20 to his mother, *Mary Jennings*, during widowhood, and subject thereto the four cottages and the £200 were to be held in trust for *Benjamin Smith Jennings* absolutely; and it was provided that if either or any of the trustees thereby appointed or to be appointed, as thereinafter mentioned, should die, or desire to be discharged from, or should refuse or become incapable to act in the trusts thereinbefore declared, before the same should be fully performed, it should be lawful for the said *Benjamin Smith Jennings* during his life, and after his decease for the trustees or trustee for the time being, or the executors or administrators of the last acting trustee, to appoint a new trustee or new trustees, as the occasion might require, to whom any requisite conveyance or assignment might be made.

The annuity thus provided for *Mary Jennings* was in substitution for one of a similar amount given to her by the will of *Jonas*

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Jennings, the father of *Benjamin Smith Jennings*, and charged upon the four cottages and also upon other property which it was desired to release from the charge.

On the 23rd of June, 1865, *Benjamin Smith Jennings* mortgaged his interest in the four cottages and the £200, together with other property (the whole being subject to two intermediate mortgages), to the *Halifax Joint Stock Banking Company*, to secure the balance of his current account. In 1869 the *Halifax Bank* exercised their power of sale over all the real estate comprised in their security. The two intermediate mortgagees were paid in full, and joined in a conveyance which was then made to *William Moorhouse* of the four cottages freed from all the mortgages, but subject to the annuity to *Mary Jennings*. The interest of *B. S. Jennings* in the £200 was not sold. That interest remained subject to the mortgage to the bank, but discharged from the two intermediate mortgages.

William Moorhouse died in November, 1872, having devised all his real estate to the Defendant *Alfred Baker Moorhouse* and his two brothers, who were not parties to the action, as tenants in common.

Isaac Smith Bakes died in December, 1872.

William Bakes died in August, 1874, having appointed the Defendant *Moorhouse* sole executor and trustee of his will, but intestate as to estates vested in him as trustee. The Defendant proved the will of *William Bakes*; and having taken possession of the four cottages and of the investments representing the £200, purported to act as trustee of the indenture of the 14th of July, 1862.

By an indenture dated the 23rd of November, 1882, *Benjamin Smith Jennings*, in exercise of the power given to him by the indenture of the 14th of July, 1862, appointed the Plaintiffs *Hardaker* and *Denton* to be trustees thereof in place of *Isaac Smith Bakes* and *William Bakes*.

The Plaintiffs to the present action were *Hardaker* and *Denton*, as trustees of the deed of 1862, the *Halifax Joint Stock Banking Company*, as mortgagees of the sum of £200 (subject to the annuity), and *Benjamin Smith Jennings*. They alleged that the Defendant *Moorhouse* had paid the annuity of £20 principally out

of the income of the £200; that a considerable sum was now due to the bank in respect of income of the £200; and that the Defendant had recently sold the investments representing the £200, and placed the proceeds to the credit of his own banking account. They claimed delivery of possession of the four cottages and payment of the £200 to *Hardaker* and *Denton* as trustees of the indenture of 1862; apportionment of the annuity between the interest of the £200 and the rents of the four cottages, and accounts generally.

One of the defences set up by *Moorhouse* in his statement of defence was that the power of appointing new trustees of the indenture of 1862 was not exercisable by *Benjamin Smith Jennings* without the consent of the Defendant and his brothers, and that having been executed without that consent it was, at least so far as regarded the four cottages, inoperative.

This was the trial of the action.

Barber, Q.C., and *Bramwell Davis*, for the Plaintiffs:—

The power to appoint new trustees is not extinguished by alienation, and may be exercised without the consent of the alienees. The only authority apparently against that position is an opinion expressed by Mr. *Lewin* in his work upon Trusts (1), but the cases cited by him do not appear to support his opinion. The exact point is not covered by decision, as there is no case where the alienees have refused to concur. We submit that their concurrence is immaterial: *Alexander* v. *Mills* (2); *Warburton* v. *Farn* (3); *Nelson* v. *Seaman* (4); *Holdsworth* v. *Goose* (5); *Eisdell* v. *Hammersley* (6).

J. G. Wood, for the Defendant:—

This is a power appendant, and though not destroyed by alienation of the donee's interest it can only be exercised with the consent of the alienees. That is the true result of *Alexander* v. *Mills* and the other cases which have been cited. I submit that Mr. *Lewin* has correctly stated the result of the authorities.

(1) 7th Ed. p. 570.
(2) Law Rep. 6 Ch. 124.
(3) 16 Sim. 625.
(4) 1 D. F. & J. 368.
(5) 29 Beav. 111.
(6) 31 Beav. 255.

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Barber replied.

NORTH, J., after stating the facts and reading the power above set out, continued:—

The question is whether the appointment of new trustees by *Jennings*, in 1882, was a valid exercise of the power or not. The argument of the Defendant is that it was not, on the ground that *Jennings* had mortgaged his interest in the whole property to several mortgagees, and that his interest in the cottages had absolutely passed to *Moorhouse;* and it was said that the power of appointing trustees could no longer be exercised without the concurrence of all the persons interested. At the time when the settlement was executed there were two persons only who were interested in the trust property, viz., the widow and *B. S. Jennings.* The trustees were the persons who were to act for the widow; they were to receive the whole income and pay her the annuity. Looking at the general scope of the deed, it appears to me that the trustees were appointed to act in the interests of the widow against the son. The donee of the power is the son. It may be that he was selected partly because he was the owner of the rest of the property; but, independently of that, it was necessary that a person in whom the widow had confidence should have the power of appointing trustees. But it was possible that the trust for the widow might last longer than the life of the son, and the deed therefore provided that after his decease the power should be exercised by the trustees or trustee, or by the executors or administrators of the last acting trustee. In deciding therefore, whether the power was intended to be exercised only while the son held the estate, I have to consider that, by the terms of the deed itself, there is one case in which, beyond doubt, the power would not be in the same person as the estate. Then, again, the words in the power are "during his life," not "while he has the property." If that had been the meaning of the parties it would have been very easy to say so. If the consent of the alienee were necessary, a state of things might possibly arise in which such consent could not be obtained, and no trustee could be appointed at all. It cannot have been contemplated that such a state of things should put an end to the trust. It appears to me therefore

that the true construction must be that which would give *Jennings*, during his lifetime, liberty to exercise the power whether he had or had not the estate. Moreover, he has not parted with the whole of the estate; as to part of it, the £200, he remains exactly where he was. The contention of the Defendant must, therefore, go to this, that parting with the smallest portion of the estate deprives a tenant for life of his power over the residue, for I agree with Mr. *Wood* in this, that the power must be exercisable as to the entire property, and is not divisible, and that the comparative value of the property parted with or retained is beside the question. Because *Jennings'* interest in part of the property has been sold I am asked to restrain him from exercising his power of appointing new trustees without the consent of the persons interested under the sale. I cannot do so, because *Jennings* has the power, during his life, under the settlement. What has taken place since does not deprive him of the power of appointing new trustees, either with or without the concurrence of alienees. It so happens that the alienees are all adult; but one of them might be an infant, in which case he could not concur, and the parties interested in the trust would be put to the inconvenience of an application to the Court to appoint new trustees.

That appears to me to be the reason of the thing. Then, is there any decision to shew that that view is one which I ought not to entertain?

The first case is *Warburton* v. *Farn* (1). There there had been a settlement in which there was a power to invest the trust fund in lands, and a power of re-sale, with the consent of the tenant for life and his wife, during their joint lives. The tenant for life mortgaged his life estate in the trust funds and all the moneys, securities, lands, and hereditaments into which the same had been, or thereafter might be, converted and changed, thus recognising the possibility of a future conversion. In 1847, the mortgagee, apparently under his power of sale, conveyed the life estate in the mortgaged property in similar terms. Then there was an agreement for sale by the trustees for sale to the defendants of a farm forming part of the mortgaged estate, with the consent of the tenant for life and his wife. The suit was for specific

(1) 16 Sim. 625.

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performance of the agreement. The defendants objected that the tenant for life, having parted with his whole interest, could not give a valid consent. Vice-Chancellor *Shadwell* held that the power of the tenant for life to consent to an exercise of the trust for sale was not destroyed by the alienation of his life interest. That is the case most like the one before me, and is in favour of the Plaintiffs as far as it goes. It is true that there was in that case a recognition of the parties that some further consent was necessary; but the decision is on the construction of the power, and that could not be affected by the view which the parties took of it.

Of the other cases referred to in *Alexander* v. *Mills* (1), the first is *Holdsworth* v. *Goose* (2). The marginal note is this: "A power of sale over a settled estate was given to trustees, at the request and by the direction of the tenant for life. The tenant for life became bankrupt. Held, that the power was not extinguished, but that with the assent of the tenant for life and his assignees, a perfect title could be made under the power." Now, I am asked to read that as if it were a decision that, but for the consent, the power could not be exercised. There were two questions submitted to the Court: (1). Whether the power of sale in the settlement was extinguished by the bankruptcy of the tenant for life; (2). Whether the consent of the tenant for life was sufficient, notwithstanding the bankruptcy, to enable the plaintiffs to exercise their power of sale either with or without the consent of the assignees. The Court answered the first question in the negative, and the second in the affirmative. Strictly speaking, that is a decision in favour of the Plaintiffs. But the assignees were consenting parties, and I do not think that Lord *Romilly* really decided that the power of the tenant for life could not be exercised without the assent of the assignees. That would not be a fair construction of the judgment. But on any construction of that case it is not a decision for the Defendant.

The next case is *Eisdell* v. *Hammersley* (3). There the marginal note is as follows: "Power of sale of realty given to trustees with the consent of the tenant for life, held exercisable after his

(1) Law Rep. 6 Ch. 124. (2) 29 Beav. 111.
(3) 31 Beav. 255.

bankruptcy with the consent of the tenant for life and of all persons who had become interested in his estate." The case is very shortly put. Neither argument nor judgment is given, but it appears from the statement that all persons were willing to join in selling the property. The defendants objected that the power could not be exercised owing to the bankruptcy of the tenant for life. I think that all the persons interested were before the Court. If not, this would be a decision against the Defendant; but as I read it, it is a decision that the power to consent was not extinguished by bankruptcy.

The next case is *Nelson* v. *Seaman* (1). What happened there was this: *Seaman* became bankrupt and *Lee* was his official assignee. In 1858, *Seaman* exercised the power of appointing two new trustees, but no assignment of the fund had been made to them. In an action for the execution of the trusts, *Seaman* submitted that the new trustees ought to be made parties. It was suggested in the course of the argument that the power in *Seaman* to appoint new trustees was not a power in gross and could not be exercised after his bankruptcy. But the Court of Appeal confirmed the order of the Court below, that the trustees were necessary parties to the suit. It does not appear from the report whether *Lee* had joined in the suit or had approved of the appointment or not. The appointment took place thirty years after the bankruptcy, and I should think he had not. The decision that the trustees were necessary parties to the suit involved the decision that they had been properly appointed. Therefore, if *Lee* had not concurred, it is a decision against Mr. *Wood's* contention; if he had, it is a neutral case not assisting him in any way.

The only other case is *Alexander* v. *Mills* (2). In that case it was conceded that the power of the tenant for life to consent amounted to the same thing as if the tenant for life had the power of sale. But the material point is that it was held that the tenant's power to consent was not extinguished by the absolute alienation of his life estate. The head-note proceeds to state that the power could still be exercised with the concurrence of the alienee. It is true that the alienee did concur in the matter, and, therefore, the

(1) 1 D. F. & J. 368. (2) Law Rep. 6 Ch. 124.

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question did not arise what the effect would be if he had not concurred. But the concurrence of the alienee was not a material point. The judgment shews that it formed no part of the decision. *James*, L.J., in answer to an observation of Lord *Romilly* in the Court below, that the intention of the settlor was that the power of sale should become incapable of being exercised on the absolute alienation of the life estate, says this (1): "If the case were unaffected by authority we should, on principle, have great difficulty in concurring in this reasoning. It appears to us that it is rather legislating than expounding—rather introducing into the settlement a provision which is not there than construing the provisions which are there. The words of the settlement are very plain and unambiguous, 'at and by the request and direction of the said *H. W. Hicks*,' and if it had been intended to add to it the qualification, 'so long as he shall retain his life estate,' it would have been very easy to say so." So in the present case, if it had been intended to confine the power to the continuance of the estate that *B. S. Jennings* had at the date of the settlement, nothing would have been easier than to have limited the power in such terms. The Lord Justice then continued: "There is no doubt that, in fact, such a qualification does, to some extent *ex post facto* exist—that is to say, that, having parted with his life estate, he is precluded from doing anything to derogate from his own grant; but that is a matter entirely between him and his alienee, and does not in any way shew that it is a qualification which the donor of the power originally annexed to it." Here *Jennings* has done nothing whatever to derogate from his own grant. The widow was entitled to an annuity. Subject to her interest *Jennings* had an interest, but he would take nothing except subject to the annuity. He then says: "We do not see what necessary or reasonably plain implication there is that the tenant for life by his own act in aliening the property, was thereby absolutely to deprive the remaindermen of the benefit they were intended to get through the honest exercise of the trustees' power and discretion, or through the honest exercise of their parents' or ancestors' discretion." So, here, I do not see why the right of the widow to have new trustees appointed should be affected by the

(1) Law Rep. 6 Ch. 133.

son parting with his own interest. The Lord Justice then reviewed the authorities, and held that *Warburton* v. *Farn* (1) differed from the case before him only on the ground that in the alienation of the life estate the power of the tenant for life was expressly reserved, and that the assent of the purchaser of the life estate was thereby made unnecessary, as there was no derogation from his grant.

It appears to me that the power in *Warburton* v. *Farn* was not expressly reserved—that there was no bargain that it should continue; but whether it was expressly reserved or not is entirely immaterial, because his Lordship proceeds to ask (2), "How could that in any way affect the original construction of the power? If to the power was by implication annexed a condition determining it in the event of alienation, how could the donee of the power alter that by merely himself saying that his alienation should not have that effect?" The question must depend upon the original terms of the settlement, and is not affected by anything which occurs subsequently. In *Holdsworth* v. *Goose* (3) and *Eisdell* v. *Hammersley* (4), the next cases to which the Lord Justice referred, the assignees did concur, for it is so stated in both instances, but the fact of their concurrence was not necessary to support those decisions. Lord Justice *James* came to the conclusion that there should be a declaration that the defendant's objection to the title was not well founded, or, in other words, that the power to consent to the sale was not destroyed. I am of opinion, therefore, that the power in this case was well exercised, and the two first Plaintiffs were well-appointed trustees. The £200 must be paid to them, and the Defendant must pay the costs up to the trial. I must, therefore, give judgment for the Plaintiffs, but with their consent I shall merely declare the trustees entitled to possession of the cottages, and shall not order the Defendant to deliver up possession as long as he accounts for the rents.

Solicitors: *Jaques, Layton, & Jaques*, agents for *Watson & Dickons, Bradford; W. & J. Flower & Nussey*, agents for *Killick, Hutton, & Vint, Bradford.*

(1) 16 Sim. 625.
(2) Law Rep. 6 Ch. 134.
(3) 29 Beav. 111.
(4) 31 Beav. 255.

H. L. F.

PEARSON, J.

1884

March 29.

In re THATCHER'S TRUSTS.

Infant—Maintenance—Contingent Interest under Will—Direction for Accumulation of Income until happening of Contingency—"Contrary Intention"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testator gave a fund to trustees, on trust for all the children of *A.* equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with benefit of survivorship amongst them, and he directed his trustees to accumulate the income of the shares of the children, and to pay the same to them as and when their presumptive shares should become payable under the previous trust.

Held, that the will did not express a "contrary intention" within the meaning of sect. 43 of the *Conveyancing Act*, 1881, and that, the children being infants and unmarried, the trustees might at their discretion apply the income of the trust fund in or towards the maintenance and education of the infants.

THIS was a petition by trustees of a will, under *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), to obtain the opinion, advice or direction of the Court under the following circumstances.

Tom Thatcher by his will, dated the 15th of February, 1872, appointed his mother, *Sarah Thatcher*, and his brother, *John Thatcher*, executors of his will. And he devised and bequeathed to them all his real estate and all his personal estate absolutely (subject to the payment thereout of his debts, funeral and testamentary expenses) upon trust for sale and conversion, and to stand possessed of the net proceeds of sale upon trust for investment upon real or government securities as therein mentioned, and to stand possessed of the securities upon trust to pay the income thereof to his mother during her life, and from and immediately after her death then, as well as to the capital of the securities as also to the annual produce, upon trust for all and every the present and future born children of his brother *John Thatcher*, who being a son or sons should attain twenty-one, or who being a daughter or daughters should attain that age or marry, in equal shares if more than one, and with benefit of survivorship amongst them in the event of any or either of them being a son or sons dying under twenty-one, or being a daughter

or daughters dying under that age unmarried. And the testator directed his trustees or trustee to accumulate the interest of the shares of such children, and to pay the same to them as and when their presumptive shares should become payable under the trusts and directions thereinbefore contained.

The testator died on the 29th of March, 1872. His debts and funeral and testamentary expenses were paid by the executors, and the estate was sold, got in, and converted, and the net residue was invested by the trustees in New 3 per Cents. The income was paid to the mother during her life. She died on the 19th of May, 1883. After her death another trustee was appointed in her stead. The brother *John Thatcher* had when the petition was presented seven children, all of whom were infants, the eldest being an unmarried daughter aged sixteen. The father's income was not sufficient for the maintenance and education of his children in a suitable manner, and the trustees were desirous of applying the whole or part of the income of the trust fund in and towards their maintenance and education.

The petition asked the opinion, advice or direction of the Court: (1) Whether, having regard to the direction contained in the will for the accumulation of the income of the shares of the infants, and notwithstanding that direction, the Petitioners were authorized (under sect. 43 of the *Conveyancing Act*, 1881 (1)) to apply the income of the trust fund, or any part thereof, at their discretion, in and towards the maintenance and education of the infants? (2) How the costs of the application should be provided for?

(1) Sect. 43 provides (1) "Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not." (3) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

PEARSON, J. 1884 *In re* THATCHER'S TRUSTS.

E. Chitty, for the Petitioners, submitted the question to the Court.

Rawlins, for the infants.

PEARSON, J.:—

I am of opinion that a contrary intention is not expressed in the will, and that the trustees are authorized to apply the income in or towards the maintenance and education of the infants. The direction to accumulate is in my judgment intended to preserve the income for the infants, but not to prevent the application of it for their benefit if necessary. I answer the first question in the affirmative. The costs of all parties will be paid out of the income.

Solicitors: *J. & W. Maude*, agents for *Belcher, Newbury.*

W. L. C.

PEARSON, J. 1884 April 4.

In re HAZLE'S SETTLED ESTATES.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *sub-ss.* 4, 6—*Tenant for Years determinable on Life—Tenant for Life—Estate determinable with Lease.*

A testator gave to his trustees a house and premises then subject to a lease for thirty-one years at a rent of £50, upon trust to permit his wife to receive the rent during the remainder of the term if she should so long live, and in case she should die before the expiration of the lease he gave the premises to other legatees; but if she should live beyond the term of the lease, then the trustees were to sell the premises and invest a sufficient sum to produce an annuity of £50 for his wife, and he gave the residue of such proceeds of sale and the amount invested, after the death of his wife, to the aforesaid legatees; and the testator declared that his wife should have no power to incumber her life estate nor to vest the same in any other person. The lessee of the house, before the expiration of the thirty-one years' term, desired to surrender the lease and take a new lease at a rent of £85:—

Held, that the widow was not a tenant for life within the *Settled Land Act*, 1882, s. 58, so as to enable her to accept a surrender, and make a new lease of the property.

JOHN HAZLE by his will, dated the 20th of June, 1866, gave to his trustees therein named a public-house called the *Walmer*

Castle, at *Plaistow*, *Essex*, together with certain premises adjoining thereto, which were comprised in a lease dated the 8th of March, 1859, granted by the testator for thirty-one years, to *Abell Collins*, at a rent of £50, upon trust to permit and suffer his wife, *Maria Hazle*, to receive and take the rents thereof for her own absolute use and benefit during the remainder of the term granted by the lease, "if she shall so long live," and in case his said wife should die before the expiration of the term, then the testator gave the premises unto and equally between all the children of his brother *William Hazle*, as tenants in common. And the testator directed that if his said wife should happen to live after the expiration of the term created by the lease, then the trustees should sell the premises and stand possessed of the proceeds upon trust to invest such a sum as would produce annually the sum of £50, which the testator directed his trustees to pay to his wife or permit her to receive during her life, and subject thereto the testator gave the residue of such proceeds of sale and the amount invested, after the decease of his wife, unto and equally between the children of his said brother *William Hazle*. And the testator also declared his will to be that his wife should not have power at any time to dispose of, charge, or incumber her estate for life in the premises thereinbefore bequeathed to her, or in the sum of £50 per annum, thereinbefore directed to be paid to her, or do or agree to do any other act with a view or intent to vest the same or any part thereof in any other person or persons, or entitle any person or persons to receive the same.

The testator died on the 20th of June, 1866.

The lease of the *Walmer Castle* had, since the death of the testator, become vested in one *Benjamin Roberts*, who had applied to the testator's widow to accept a surrender of the lease of March, 1859, and to grant him a new lease of the public-house for twenty-one years from the 25th of December, 1883, at the increased rent of £85 per annum. The widow was desirous of accepting the surrender and granting a new lease, if she had power to do so. This summons was taken out by the widow and by the only surviving trustee of the will under the *Settled Land Act*, 1882, for the direction of the Judge upon the following questions:—1. Whether the said *Maria Hazle*, the widow, was,

PEARSON, J. 1884 *In re* HAZLE'S SETTLED ESTATES.

under the provisions of the *Settled Land Act*, 1882, or otherwise, legally able to accept a surrender of the existing lease and grant a new lease as proposed. 2. Whether it was proper that the trustees of the will should assent to the grant of the new lease. 3. Whether the rent receivable under such new lease, if granted, would be payable by the trustees of the will to *Maria Hazle*, during the whole of the remainder of her life, if she should happen to live after the date at which the original term would have expired by effluxion of time, or up to the last-mentioned date only if she should so long live. 4. How the excess of the rent under the proposed lease over the original rent of £50 was to be applied.

This summons had not been served upon any other person.

Grosvenor Woods, in support of the summons :—

It is submitted that in this case the widow of the testator has, under the *Settled Land Act* (45 & 46 Vict. c. 38), the powers of a tenant for life. The 58th section of that Act provides that each of the following persons when the estate or interest is in possession, shall have the powers of a tenant for life under the Act. Then the 4th sub-section includes "a tenant for years determinable on life, not holding merely under a lease at a rent," and the 6th sub-section includes "a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate or by conditional limitation, or otherwise." *Maria Hazle*, the widow of the testator, must come within one of these sub-sections ; either she is a tenant for years—that is for the unexpired lease determinable on her life—or she is a tenant for her own life determinable in the event of the expiration of the lease during her life. If she is a tenant for life within the meaning of the Act, she would have power to grant a lease of the settled land for twenty-one years under sect. 6, and to accept a surrender of the old lease under sect. 13 of the Act. The widow is desirous of acting for the benefit of the persons who take after her death as well as for herself, and will conform to the 53rd section of the Act in all respects, and is willing to accede to any stipulations the Court may think fit as to the surplus rent receivable under the proposed renewed lease.

PEARSON, J.:—

I am unable to come to such a decision in this case as the parties desire. I cannot hold that Mrs. *Hazle* is in the position of a tenant for life of the property in question within the meaning of the 58th section of the *Settled Land Act*.

The testator, *John Hazle*, made a specific bequest of a public-house, comprised in a lease created by himself, upon trust for his wife during the remainder of the term, if she should so long live. He cut off as it were that lease, or rather the rent payable under it, and distinguished it from all the rest of his property, and expressed it as his intention that if the lease should come to an end before the death of his wife, the reversion, when it fell into possession, should be sold and the proceeds disposed of in a particular manner. Now, I think that sect. 58, sub-sects. 1, 4, of the *Settled Land Act*, 1882, applies to the case of a gift of property to a legatee for a term of years, which may or may not outlast that legatee's life, and it also applies to the case of a gift of property to a legatee for a term of years, if she should so long live. In either of those cases, according to my view of the true construction of the Act, the sub-section applies. But I cannot read it as referring to an interest in a term of years which is to determine with the life of a legatee. In this case I should be construing the will and the sub-section so as to defeat the intention both of the testator and the statute, if I were to hold that Mrs. *Hazle's* interest in this lease carried with it the right to deal with the lease in the manner proposed. I cannot hold that Mrs. *Hazle* is tenant for life of the public-house for the remainder of the term within the meaning of the Act, so as to enable her to accept a surrender and make a new lease, and so defeat the expressed intention of the testator, which was, that when the reversion, which was subsisting at his death, fell into possession, it should be sold. The first question raised by the summons must be answered accordingly, and consequently the remaining questions do not arise.

Solicitors: *West, King, Adams, & Co.*

T. W. G.

PEARSON, J.

In re PILLING'S TRUSTS.

1884
April 9.

Amending Order—Death of Sole Trustee intestate—Vesting Order—Conveyancing and Law of Property Act, 1881, s. 30.

Upon the death of a sole surviving trustee intestate, the Court made an order for the appointment of new trustees, and ordered certain lands forming part of the estate to vest in the new trustees "for the estate therein now vested in the heir-at-law of the deceased trustee." After the order had been passed and entered administration was taken out to the estate of the deceased trustee. Upon motion that the order of the Court might be altered by substituting the legal personal representative for the heir-at-law of the intestate trustee in accordance with sect. 30 of the *Conveyancing and Law of Property Act*, 1881, the Court made a new order, that, notwithstanding the previous order, the land should vest in the new trustees "for all the estate therein now vested in the legal personal representative" of the deceased trustee.

IN January, 1883, upon the death intestate of a sole surviving trustee, an order was made by *Fry*, J., for the appointment of new trustees, and vesting the trust estates in such new trustees. No administration had then been taken out to the intestate's estate, and the order, as drawn up, passed and entered, directed certain lands which formed part of the trust estate to vest in the new trustees "for the estate therein now vested in the heir-at-law of the deceased intestate trustees." After the date of the order administration was taken out to the intestate's estate, and a question had been raised whether the legal estate in the real estate did not thereupon vest in his administratrix notwithstanding the vesting order.

H. Greenwood moved, under Rules of Supreme Court, 1883, Order XXVIII., rule 11, to correct the order, either by substituting the words "for all estate therein which would now be vested in (the intestate) if living," as in *Seton* (1), for the words referring to the heir-at-law, or by post-dating the order, entering the letters of administration among the evidence read, and substituting "the legal personal representative" for the "heir-at-law" of the intestate. He referred to *In re Clinton* (before Mr. Justice *Chitty* on Dec. 11, 1882).

(1) 4th Ed. p. 539.

PEARSON, J., after consulting the Registrar, said:— PEARSON, J

1884

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This motion raises a question of great importance on the construction of sect. 30 of the *Conveyancing Act*, 1881, which provides that the legal estate vested in a trustee or mortgagee shall "on his death" "devolve to and become vested in his personal representatives or representative from time to time." The question is, what happens when there is no personal representative? If the legal estate does not vest in the heir, where is it? On the other hand, the wording of the section seems to evince an intention to exclude the heir. As there is now a legal personal representative I will make a new order, on the motion, that, notwithstanding the previous order the land shall vest in the new trustees for all the estate therein now vested in the legal personal representative. I cannot alter the order made by my predecessor so long ago.

Solicitors: *W. & J. Flower & Nussey.*

T. W. G.

C. A.
1883
CHITTY, J.
Feb. 27, 28.
C. A.
1884
Feb. 27, 28.

BAYLEY *v.* GREAT WESTERN RAILWAY COMPANY.

[1881 B. 3319.]

Right of Way—"Right occupied or enjoyed as parcel or member" of the Tenement granted—Unity of Possession of Tenement and Way—Purchase by Railway Company—User for Purposes of Railway.

A railway company purchased, under the powers of their Act, a piece of land on which was a stable. By the conveyance to the company the premises were granted together with all "rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience and had used it ever since. The soil of this road was not conveyed to the company and no express mention of it was made in the conveyance. The Plaintiff refused to allow the company to use the road:—

Held (affirming the judgment of *Chitty*, J.), first, that notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the company, a right of way passed to the company under the general words in the conveyance.

Kay v. *Oxley* (1) and *Watts* v. *Kelson* (2) followed.

Secondly, that the fact of the stable having been purchased by a railway company for the purposes of their undertaking did not preclude them from claiming the right of way so long as they used the premises as a stable; which they might lawfully do till such time as they were required for the special purposes of the railway, or were sold as superfluous land.

Whether the railway company would be entitled to claim the right of way after they had ceased to use the premises as a stable, and had converted them to some purpose connected with the railway—*Quære.*

SPECIAL CASE.

In 1874 the *Great Western Railway Company*, under the powers of the *South Devon Railway Act*, 1872, gave notice to the Plaintiff that they required to take for the purposes of their undertaking the piece of land specified in the schedule to the notice, with the messuage and stables standing thereon, the premises being further described in a plan drawn in the schedule and coloured pink.

By an indenture dated the 14th of August, 1875, and made between the Plaintiff of the one part and the company of the other part, after reciting that the Plaintiff, *Bayley*, was seised in fee simple in possession, "free from all rights of way and other

(1) Law Rep. 10 Q. B. 360. (2) Law Rep. 6 Ch. 166.

incumbrances, of the several pieces or parcels of land, messuage, or dwelling-house, cottages, offices, stables, coach-houses, greenhouse, carpenter's shop, sheds, buildings, out-buildings, yards, curtilages, gardens, and other hereditaments situate at *Coxside*, in the parish of *Charles*, in the borough of *Plymouth*, hereafter particularly described, and with their rights, members and appurtenances hereby granted and conveyed or otherwise assured or intended so to be, and which the *South Devon Railway Company* are by the *South Devon Railway Act*, 1872, and the public general Acts incorporated therewith, some or one of them, authorized to purchase and take for the purposes of their undertaking and works;" it was witnessed that in consideration of £15,330 12*s.* 2*d.* paid by the company to the Plaintiff, the receipt of which sum, and that the same was in full satisfaction for the absolute purchase of the said several pieces of land, messuage, and dwelling-house, and other hereditaments, with their and every of their rights, members, and appurtenances in fee simple in possession free from all rights of way and other incumbrances, the Plaintiff thereby acknowledged, the Plaintiff conveyed to the company the hereditaments particularly described in the indenture, and specified in a plan drawn thereon—the "stables" being expressly mentioned, and the plan being a copy of the plan in the schedule to the notice to treat—together with all buildings, erections, sheds, walls, hedges, fences, trees, ditches, rights, members, and appurtenances whatsoever to the said several pieces or parcels of land and hereditaments hereby granted and conveyed or otherwise assured, or intended so to be, or to any of them belonging, or in anywise appertaining or deemed, taken, or known, held, occupied or enjoyed as part, parcel, or member thereof.

The property so conveyed formed part of an estate which at the date of the conveyance had belonged to the Plaintiff and his predecessors in title for more than eighty years.

In 1811 the Plaintiff's predecessors in title built on part of their estate, not comprised in the sale to the company, a row of houses called *Brunswick Terrace*, fronting *Exeter Street*, a public highway forming the northern boundary of the estate, and for the convenience of these houses they made on their estate a private road from *Exeter Street*, round to and along the back of the houses.

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The soil of the private road was thus the property of the Plaintiff and was vested in him subject to the rights (if any) over the same. The road throughout its whole length adjoined the land specifically described in the conveyance to the company and coloured pink.

The stables comprised in the conveyance were built in the years 1822 and 1829, by the Plaintiff's predecessors in title, for the accommodation of the occupiers of the houses in *Brunswick Terrace*. These stables fronted the private road, and had always had doors opening on to it, and this road was at the date of the purchase and conveyance and always had been the obvious access to these doors. The stables had besides windows overlooking the road. There were also doors and windows in the other side of the stables, opening on to and overlooking the land purchased by the company, which was a field, but these last mentioned doors did not afford any access to the private road.

In 1872, on the passing of the *South Devon Railway Act*, 1872, the Plaintiff let one of the houses in *Brunswick Terrace* to a Mr. *Hayes*, and subsequently, in 1874, let him the said stables on a yearly tenancy, determinable by a three months' notice; and as tenant of the stables, *Hayes* had access to and used the private road as a means of communication with *Exeter Street*, and enjoyed the access of light and air through the windows overlooking the private road. At the date of the conveyance to the company both the stables and the private road were in the possession of the Plaintiff, but subject, as regards the stables, to *Hayes*' tenancy.

No compensation had been specially claimed by or paid to the Plaintiff in respect of any rights of way over or user of the private road, and no claim was made for contribution by the company to the expenses of its maintenance or repair. Although the stables were specifically mentioned and comprised in the conveyance to the company, the private road was not mentioned or referred to therein in express terms. It appeared that the private road lay outside the company's limits of deviation.

The Plaintiff having forbidden the company to use the private road, and having insisted that he had a right to block out the access of light and air to the windows overlooking it, the decision of the Court was asked :—

1. Whether the Defendant company had any right of user of or right of way over the private road by virtue of their conveyance or otherwise; and

2. Whether the company were entitled to an easement of light and air over the private road.

This second question was, at the hearing of the special case, not contested by the Plaintiff, and was therefore decided without argument in favour of the Defendants.

The special case came on for hearing before Mr. Justice *Chitty* on the 27th of February, 1883.

Ince, Q.C., *J. W. Batten*, and *Dundas Gardiner*, for the Plaintiff:—

No right of way over the private road passed by the conveyance, for there was no express grant of it, and it was neither "a way appurtenant" nor "a way of necessity," and the Defendants being a railway company, must be restricted to the actual terms of their conveyance: *Thomson* v. *Waterlow* (1); *Pinchin* v. *London and Blackwall Railway Company* (2); *Bolton* v. *Bolton* (3); *Simpson* v. *South Staffordshire Waterworks Company* (4); *Bostock* v. *North Staffordshire Railway Company* (5); *Norton* v. *London and North Western Railway Company* (6).

Romer, Q.C., and *Medd*, for the Company:—

The general words of the conveyance were sufficient to pass a right of way over the private road as a "right" or easement actually enjoyed at the time, although it might not be, in the strict legal sense "a way appurtenant." The right of using the road as the only obvious mode of access to the stables must be deemed to have been intended to pass under a conveyance of the "stables," and the "rights, members and appurtenances . . . held, occupied or enjoyed" therewith. If the general words were sufficient—as the authorities shew they were—to pass such a right of way to a private individual, an opposite construction should not be adopted simply because, as in the present instance, the grantee happened to be a public company: *Swindon Water-*

(1) Law Rep. 6 Eq. 36.
(2) 5 D. M. & G. 851.
(3) 11 Ch. D. 968.
(4) 13 W. R. 729; 34 L. J. (Ch.) 380.
(5) 3 Sm. & Giff. 283.
(6) 9 Ch. D. 623; 13 Ch. D. 268.

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works Company v. *Wilts and Berks Canal Navigation Company* (1); *Earl of Sandwich* v. *Great Northern Railway Company* (2); *Kay* v. *Oxley* (3); *Barkshire* v. *Grubb* (4); *Langley* v. *Hammond* (5); *Watts* v. *Kelson* (6); *Allen* v. *Taylor* (7); *Gale* on Easements (8).

Ince, in reply.

[CHITTY, J., referred to *Polden* v. *Bastard* (9) and *Leech* v. *Schweder* (10).]

CHITTY, J.:—

The questions submitted to the decision of the Court on this special case are, first, whether the Defendants have, by virtue of the conveyance to them, any right of user of or right of way over the private road referred to in the special case; and secondly, whether by virtue of the same conveyance, the company are entitled to any easement for the access of light and air over the private road and other adjacent land of the Plaintiff. Both these questions are submitted on the footing of the conveyance of the 14th of August, 1875, and on any other grounds warranted by the facts as appearing in the special case.

In regard to the question of light it appears that the Plaintiff, by the conveyance of 1875, conveyed to the Defendant company certain parcels of ground and also stables, which stables abut upon the private road referred to. At the Bar, the Plaintiff's counsel advisedly and quite rightly abandoned the case as to light, because they felt the force of this principle, that where a house is granted lights as enjoyed by the house at the time of the grant pass without any express words, or indeed any words whatever, which implies a grant of the lights beyond the term "house"; and of course the same principle would apply in all its force to a grant of stables. That being so, the question of the access of light must be decided in favour of the Defendant company.

Then comes the question, which upon the facts of the case

(1) Law Rep. 7 H. L. 697.
(2) 10 Ch. D. 707.
(3) Law Rep. 10 Q. B. 360.
(4) 18 Ch. D. 616.
(5) Law Rep. 3 Ex. 161.
(6) Law Rep. 6 Ch. 166.
(7) 16 Ch. D. 355.
(8) 4th Ed. pp. 80, 81.
(9) Law Rep. 1 Q. B. 156.
(10) Ibid. 9 Ch. 463.

before me is one of some little difficulty, namely, whether the company have a right of user of the private road. The facts are these. The stables abut on the private road. There have always been doors in the stables opening on to the private road, which private road at the time of the purchase and conveyance was and always had been the obvious access to such doors. The road belonged, as to the soil thereof, to the Plaintiff, and at the date of the conveyance the stables were in the occupation of a Mr. *Hayes* as tenant of the Plaintiff; and he had, as a matter of fact, between himself and his landlord, and, as I gather, also as a matter of right, the use of the road for the purposes of access. The tenancy was a yearly tenancy determinable on a three months' notice. It is quite plain that at the date of the conveyance there was no right of way that was "appurtenant" to the stables, using the term in the legal and strict sense. It is equally plain that the way was enjoyed as a matter of fact by the tenant. It is equally plain from what I have said that this was the obvious access to the stables; and the first question that I have to consider is, what is the true construction of the conveyance itself?

I should say that part of the argument adduced by the Plaintiff's counsel on this question was that where a railway company takes a conveyance of land simply, and there is as "appurtenant" to that land, in the legal and strict sense of the term, a right of way, that right of way does not pass, because the conveyance is to a railway company. That argument may be disposed of in two or three words. The *Lands Clauses Act*, under which this conveyance was made, and under which these lands were taken, contains a schedule which is referred to in the 81st section of the Act, a section which enacts that a conveyance of lands to be purchased under the provisions of that or the special Act may be according to the forms in the Schedules (A) and (B); and Schedule (A) is a form of conveyance to the company of the lands purchased, "together with all ways, rights and appurtenances thereto belonging." That, in my opinion, shews clearly that, if the railway company takes a conveyance and there are no express words in the conveyance one way or the other, the Legislature considers that the right of way which was appendant or appurtenant to the lands in question should pass. As if the

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Legislature had foreseen that such a question as this might arise, in order to prevent any question of the kind arising, in the statutory form they introduced the words "together with all ways, rights and appurtenances thereto belonging." Therefore, I should decide—if this were the only question before me—that a right of way which was legally annexed to the property conveyed would pass to the railway company.

But, as I have said, in this case it cannot be contended on the part of the railway company that there was any right of way which, in the strict sense of the term, was "appurtenant" to the stables; but on the part of the railway company it is said that there is an express grant of the way in question. Every part of the deed has been referred to in the argument, and therefore I will go through the deed at somewhat greater length than I should have otherwise thought necessary. [His Lordship then read the material portions of the deed as above stated, and continued:—] Upon that the railway company argue that there is an express conveyance of a right of way created by deed for the first time by virtue of the words I have read; and they say that though the right of way did not at the date of the conveyance exist as a right of way, yet there is a reference to the user, and the user and enjoyment at the time must be regarded; and that when you find that the way was enjoyed not as of right but in fact at the date of the conveyance, the words are sufficient to pass it. The difficulty in the company's way at first sight are the words "rights, members." On the part of the Plaintiff it is said that those words refer only to those rights which are enjoyed, so to speak, "as of right;" and it is pointed out that the term "ways" does not occur in this deed. That is quite true: but, having regard to the decisions on this point, one or two of which I will mention presently, I think there is enough on the face of this conveyance to shew that the term "rights" is not used in its strict legal sense throughout this clause. It is, no doubt, used in the earlier part of the clause as "rights" in the strict sense; but when you come to the latter part of the clause it appears to me that the term "rights" must be used in some secondary sense and as denoting something less than the legal right. In point of law, rights with reference to land

would include all easements, and easements would include, as a subordinate class, rights of way; and it appears to me that the term "rights" is here used in that sense, and that, for the purpose of seeing what the parties intended should pass by way of express grant, I must look to the actual facts as they existed at the time of the execution of the conveyance. Besides that, I am entitled to look and I do look at the plan. On the face of the plan it appears that the stables abut upon the private road in question, and at the time when the deed was executed, the tenant *Hayes* was in occupation of the stables and had actually the user of the way for the purposes of going to and from them.

Now the user by the tenant clearly did not create an easement or right of way annexed to the fee simple of the land conveyed, because the user was only a tenant user over land which belonged to the landlord. If authority were wanting for that, *Gayford* v. *Moffatt* (1) is sufficient to shew that no right is acquired so as to become annexed to the fee simple by the enjoyment, even as of right, by a tenant of a way over his own landlord's ground.

Before I go to the authorities I will mention the following point. During the argument I put this case to the Plaintiff's counsel: assume that a house abuts on a private road belonging to the owner of the house, with its front door opening on to the private road, and that there is an ordinary back way to the house, so that, as a matter of fact, you could get into the house, not by the front door in the ordinary way, but by the back door. If in those circumstances the owner of the house and of the private road in front were to grant the house, and the deed were entirely silent as to the private road running in front, would the grantee of the house have a right of way? The Plaintiff's counsel said "No;" and as far as I am aware there is no express decision on the point. But if that point should ever come for decision, it seems to me it will be worthy of consideration whether the same principle which applies to the grant of a house with reference to light should not apply to the grant of the house with reference to a way of this kind. I am assuming that in such a case there is a front door, and that the private road is the usual mode of

(1) Law Rep. 4 Ch. 133.

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access to the house as a house, a man not being in the habit of approaching his own house by the back door. I quite admit that in point of law there is a difference between the easement of light which is always permeating the open spaces which form the windows of a house, for in that sense, no doubt, the easement of light is continuous, whereas, as regards a right of way, that is a discontinuous easement, because a man is not always walking in and out of his front door: but at the same time the reason why the easement of light passes as against the grantor is because the grantor has granted the house in the state in which it is. It seems to me there is strong ground for holding, if the point should come up for consideration, that in the case I have put, of the right of way, there is in like manner a grant of the house to be used as the house stands, and that the ordinary mode of access to the front door is one that ought to pass.

But that is not the case I have now to consider. Substituting "stables" for "house" the case is, no doubt, exactly similar to the one I have put; but there are in the particular conveyance before me words which, on the true construction of them, appear to me to be an express grant of the way actually used at the time. Here there is only this one way: it is not a question of half a dozen ways or accesses, but this is the obvious mode of access to these stables. No doubt the horses could be taken out, and the carriages also, by the back door of the stables across the field, but that is not the way in which stables are ordinarily used. The horses are taken out of the front door of the stables and so are the carriages. For these reasons it appears to me that in this case there is a grant of a way, considering this as a conveyance between ordinary parties, and quite apart from the question which has been raised as to whether any difference ought to be made because the grantee happens to be a railway company.

But before I leave this part of the case I will refer to the authorities, which appear to me to be directly in point. On the construction of the deed, the first case to which I shall refer is that of *Kay* v. *Oxley* (1), where the words of the conveyance were, "together with all . . . . ways and rights of way . . . .,

(1) Law Rep. 10 Q. B. 360.

easements, and appurtenances to the said dwelling-house, cottage, and hereditaments, or any of them, appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto." The Court of Queen's Bench held that a private way which was actually used or enjoyed at the date of the conveyance passed although it was not strictly appurtenant.

In *Barkshire* v. *Grubb* (1), Mr. Justice *Fry* having before him a case of rectifying a deed of conveyance, considered that he ought to suppose that the deed, which was executed in pursuance of an informal agreement, contained the ordinary general words; and he goes on to say, "I think that among the general words would have been found a grant of 'all ways now used or enjoyed with' the blue land." It was the owner of the blue land, under the informal agreement for partition, who was claiming a way over a clearly defined path constructed over another portion of the land which was the subject of the agreement for partition; and Mr. Justice *Fry* held that a right of way over this clearly defined path would have passed if the words had been such as he assumed ought to have been contained in the conveyance. Quoting from the judgment of Lord Justice *Mellish* in *Watts* v. *Kelson* (2), he says: "'I am not satisfied that if a man construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field.' And," continues Mr. Justice *Fry*, "when he afterwards delivered the considered judgment of the Court of Appeal, he said (3): 'We may also observe that in *Langley* v. *Hammond* (4), Baron *Bramwell* expressed an opinion, in which we concur, that, even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words.'" Then Mr. Justice *Fry* says, "I adopt that view. I think that when there are two adjoining closes, and there exists over one of them a formed and

(1) 18 Ch. D. 616, 621, 622.
(2) Law Rep. 6 Ch. 172.
(3) Law Rep. 6 Ch. 174.
(4) Ibid. 3 Ex. 161.

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constructed road, which is in fact used for the purposes of the other, and that other is granted with the general words 'together with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously." That passage shews that he understood the language of Lord Justice *Mellish* and Baron *Bramwell*, when they used the term "with the ordinary general words," to mean the ordinary general words which in our time have been always inserted by conveyancers, namely, words which go beyond merely that which the law itself would imply from a grant of the easements which already are annexed to the land—words such as "together with all ways now used or enjoyed therewith," and which, according to my reading of this deed of conveyance, are to be found here. I think it unnecessary for the purpose of this judgment to refer to any other authorities.

Now comes the question whether any difference is to be made in the construction of this instrument of conveyance because the grantee happens to be a railway company. Upon that it is said that a railway company can only take the lands included in their notice to treat, and that the lands in this particular case included in the notice to treat were the lands coloured pink, and nothing more: also that in the notice to treat they did not suggest that they were going to take a right of way. It is also said that the way itself—the site of the private road—is outside the limits of deviation. But the question before me is not one of rectifying the deed: I must take the deed as I find it; and upon the construction of the deed I do not find that ambiguity which the counsel for the Plaintiff say, on the reading of the deed as a whole, exists. The way in which they shape their argument on this part of the case is, that in the first recital, which I have read, there is a reference to the statutory powers. But the mode in which that reference is made is well known to conveyancers. After the description of the lands and property of which Mr. *Bayley* is said to be seised, there follow the words "with their rights, members, and appurtenances hereby granted and conveyed," throwing any one who reads the recital on to the operative part of the deed. And the words which follow, referring

to the Acts of Parliament, are only inserted in the manner well known to cautious conveyancers, so as not to limit that which has gone before: they are not inserted for the purpose of cutting down the previous recital in any way, but merely state an additional fact with reference to the lands.

A similar observation occurs with regard to the body of the deed, where the money is said to be paid for the purchase of the "said" lands, "with their and every of their rights, members, and appurtenances," the word "said" throwing you back to the recital, which recital again throws you forward to the body of the deed, where the description of the parcels and the general words are to be found.

It seems to me that there is not any ambiguity in this deed, and that I ought not to give effect to the argument which is put forward as against the Defendants, that they are a railway company. The railway company buy the land and they buy the stables, and they have paid for the stables as such; and as part of the price which they have given for the stables they must have paid a sum of money which would permit the enjoyment of the stables as such, including, therefore, a right, which I say is expressly granted, of going to and from these stables by the ordinary mode of access.

For these reasons I think the Plaintiff's claim fails wholly. It fails admittedly as to the lights, and I think, for the reasons I have stated, that it fails also as to the right of way.

There must, therefore, be a declaration that the company have a right of user of this private road.

G. I. F. C.

C. A.

From this decision the Plaintiff appealed. The appeal came on for hearing on the 27th of February, 1884.

Littler, Q.C., and *J. W. Batten*, for the Appellant:—

There was no right of way at the time of the conveyance to the company, the stables and the road to it having been always in the possession of the same owner. Therefore no right of way passed under the general words: *Thomson* v. *Waterlow* (1).

(1) Law Rep. 6 Eq. 36.

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[COTTON, L.J.:—Having regard to *Watts* v. *Kelson* (1) can you maintain that if the owners had sold the stables to a private individual the right of way would not have passed?]

However that may be, the case is very different when the purchase is by a railway company. Both parties intended that the premises should be used for the purposes of the undertaking and not as a stable, and the conveyance must be construed in accordance with that intention. The rights of a public company over their land are much more restricted than the rights of private owners. *Bostock* v. *North Staffordshire Railway Company* (2) strongly illustrates this. In *Mulliner* v. *Midland Railway Company* (3) it was held that a grant by a company of a right of way over part of their land was void as being inconsistent with the purposes of their Act. Here the user of the stable is inconsistent with the purposes of the Act: *Norton* v. *London and North Western Railway Company* (4). Mr. Justice *Chitty* thought that *Kay* v. *Oxley* (5) was strongly against us; but that was a case between private individuals.

Webster, Q.C., *Romer*, Q.C., and *Medd*, for the Defendants, were not called on.

COTTON, L.J.:—

This is an appeal from Mr. Justice *Chitty* upon a judgment given by him on a special case stated between the Plaintiff and the *Great Western Railway Company*. The only question which we are asked to decide is this—whether the Defendant company had any right of way over a particular private road by virtue of the conveyance to them of the 14th of August, 1875. There is another question asked, but that was abandoned in the Court below and has not been raised here by the Plaintiff. Mr. Justice *Chitty* decided in favour of the company.

I may state, and I may have to advert to it again, that no question is raised in this case that the company are using this stable which has been conveyed to them and this land which has

(1) Law Rep. 6 Ch. 166.
(2) 3 Sm. & Giff. 283; S. C. 4 E. & B. 798.
(3) 11 Ch. D. 611.
(4) 9 Ch. D. 623; 13 Ch. D. 268.
(5) Law Rep. 10 Q. B. 360.

been conveyed to them in a way contrary to the provisions of their Act of Parliament, or that they could be restrained from allowing the stable to be used for the purposes for which it is used. The conveyance, subject of course to the arguments which have been relied on as to the position of the railway company, the grantee, is that which must govern this case. The railway company gave notice to take and took a large block of land, in one corner of which, the north-west corner, there was a stable, and before the gate of that stable there was a private road made by the owner of the property taken by the railway company and of the adjoining land for the convenience of himself and other occupiers of the stable. At the time it was taken by the company the owner did not himself use the stable, as he had done, for his horses, but it was let to a tenant, and the access used for the purpose of getting horses and carriages to the stable was that private road the right to use which is the question in the case.

Now the conveyance between the Plaintiff and the predecessor in title of the present Defendant company, the *South Devon Company*, conveyed to the railway company "all those pieces or parcels of land, with the messuage or dwelling-house, cottages, offices, stables," expressly mentioned, "and coach-house thereon," and then there are general words, "with all buildings, &c., rights, members, and appurtenances whatsoever, to the said several pieces or parcels of land and hereditaments hereby granted and conveyed, or otherwise assured, or intended so to be, or any of them belonging or in any wise appertaining, or deemed, taken or known, held, occupied, or enjoyed as part, parcel, or member thereof." Now, undoubtedly, as this stable was so sold, and the piece of land over which the access to the stable was enjoyed was in the hands of the same owner, no easement in the right of way was acquired, but the way was actually enjoyed by the occupier of the stable for the purpose of access to that stable, and it was hardly contested, and I am of opinion it could not be contested, that as between ordinary grantor and grantee of this stable there would have passed with the stable, on a conveyance of the stable, a right to use that road which was a reasonable access to the stable, and which, as a matter of fact, had been enjoyed with the stable as the means of access thereto. If the road had been the

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property of anyone else, and had been so enjoyed, it would have become an easement. It was not an easement, but it was a right to use it which passed to the grantee of the stable, as that which had been used and enjoyed with, and had been held, occupied, and enjoyed together with the stable.

Then it was said that the position of the railway company made a difference, and that was really the main argument before us.

Before I go to that, I may observe on one particular phrase in the parcels, namely, "stables and coach-houses," it was said that might just as well have been described, having regard to the purpose for which this land was sold to the company, as a piece of land covered with bricks and mortar. But if one is to rely on words, we do find the words "stables and coach-houses," and we find that together with them there are general words which pass all those rights and members used, enjoyed, or occupied therewith. Why should the stables being used by the company make any difference? It was put in two ways, first, that if these words are doubtful one ought to consider the use for which the purchaser bought. One case was quoted where words which on their fair and reasonable construction bear a particular meaning, were cut down by considering the purposes for which it was intended the land should be used. Undoubtedly when a grant is made for a particular purpose, on the principle that with a grant passes that without which the thing granted cannot exist, you do take into consideration that purpose which was in the minds of both parties when the grant was made. But here we are asked, in consequence of the fact of the grantee being a railway company, to cut down what otherwise would be the fair meaning of these words, that is to say, to give an effect contrary to that which upon their interpretation as between vendor and purchaser they ought to bear. It was put in this way, that railway companies only have authority to do that which their Acts give them authority to do, and that the Courts have expressly prevented them from using what they bought for one purpose for another and a different purpose. But that is limited in this way. When a company is intending to alter the land which it has bought by constructing on it works or other things which will interfere with the rights previously enjoyed by the adjoining owners,

the Court will say you are authorized to make a railway, and whatever the result of that may be, subject to compensation, if compensation is given, the adjoining owner must bear it. But when they are doing something on their land, either by digging a shaft, or erecting a building, which they are not authorized to do, then the Court has a right to interfere on the ground that they are abusing their parliamentary powers by which they acquire the land. What is the position of things here? If the vendors intended so to prevent the user of these stables and the right of way to them, of course the natural way would have been for the company to have entered into a covenant. Can it be said that the words here are equivalent to such a covenant. In my judgment they are not. If there were an express covenant not to use the building as stables then the company would be prohibited from using it as stables, and if they were prevented by the Court from using the building as stables then the right to use this way to the stables would cease when the injunction was granted. But there is nothing to compel us to arrive at that conclusion except the argument that railway companies must be confined within their powers. Undoubtedly they could only buy this land if they honestly required it for their own purposes. But what does Parliament say? Parliament says that if a railway company do not use their land within a limited time for the purpose of their undertaking, then it becomes superfluous land and goes to the adjoining owner, or to the person from whom it was bought. During that period, which cannot yet have arrived, the land, even though not used for the actual purpose of the railway, is retained, and at the end of the time when it becomes necessary to inquire whether it has become superfluous land, if the railway company say, and the Court is satisfied that they are saying so honestly, "though we have not applied it to any railway purpose yet we do honestly require it for a purpose which will arrive in a limited period," the Court allows them to keep it. What are they to do within the period during which they are not bound to sell, and, although they have not used it for a particular purpose, are not bound to treat it as superfluous land? They may not erect upon it anything which, altering the character of the ground, would interfere with the rights of neigh-

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bours. That is the case which was referred to of *Norton* v. *London and North Western Railway Company* (1), before Vice-Chancellor *Malins*. But is there any decision or any statutory enactment which will prevent them from using their land in the same state and condition without making any alteration by building, or otherwise, which would interfere with the rights of their neighbours until the time arrives when they must either sell it or satisfy the Court that they are keeping it for the purposes of their undertaking? In my opinion, during that time they have a perfect right to use it in the same state in which it was conveyed to them, not to alienate it, or to do an act which will prevent them from ever using it for the purposes of their railway, but using it by way of interim user till the time arrives when they apply it to the purposes of their undertaking. Therefore, in my opinion, it cannot be said that using these stables as such till the time arrives when they must either sell them or satisfy the Court that they intend to use them for their railway purposes, is wrong and prohibited by Act of Parliament. That being so, so long as these stables are lawfully used as stables (and if they are unlawfully used they can be stopped by another proceeding which we are not considering here), on the construction of the grant to them they had and have a right to use the right of way which passed by the grant to them of the stables with the "members used and enjoyed therewith."

Then it is said that the case of *Mulliner* v. *Midland Railway Company* (2) is against this view. But in that case the railway company having constructed their railway, had purported to grant a perpetual right of way to the Plaintiff, and he sought to make use of that for the purpose of preventing them from carrying out some further railway purposes which required the user of this piece of land over which they had purported to grant him a perpetual right of way. They had, therefore, attempted in perpetuity to alienate the land which they only held for the purposes of their railway, and that was held bad. But that is an entirely different thing from what we are here considering, where we must treat it as if there is no ground for saying that they are

(1) 9 Ch. D. 623. (2) 11 Ch. D. 611.

improperly allowing these three stables to remain. They may have lost their parliamentary powers for the purpose for which they originally bought these stables, but still at the end of the five years, or whatever the period may be which is limited in this Act, they have the right to retain them if they can shew they can apply them to any other railway purposes.

That leads me to another point that has been urged on us. It is contended that there are cases which decide that when the need for the easement ceases the easement ceases—that is, that when this building which has enjoyed a right of way as a stable is no longer used as a stable, when it is pulled down and a station is built, if that is ever done, then the right which is granted to a stable will not exist for an entirely different purpose, namely, the passage of omnibuses, carts, and carriages to the station. That we are not considering. This building is being used as a stable only, and the sole question between the parties while that is so is this, have the railway company, by virtue of their conveyance, that right of way which was in fact enjoyed by the occupier of the stable as appurtenant thereto.

That really disposes of the principal arguments which have been addressed to us; but I may mention one other, though I cannot see that it can interfere with the true construction of this grant. It was said that for the company to acquire the right to use this way under this grant would be contrary to the view of Parliament requiring a railway company always to state most particularly what they intend to acquire and what access they intend to make. Now, as regards what they intend to acquire, if acquiring this stable carried with it, not the soil of the road but the right to go over that road, they have given the notice that is required. The argument seems to me not sufficiently to discriminate the difference between claiming to have the soil of the road and claiming to have a right to go over the road, as it had been previously enjoyed together with the stables, and, as we hold, it passed with the grant of the stable. As regards the other matter as to the access, that, in my opinion, does not mean that if in buying a house they buy, as belonging to it, a right to use a certain way they are to indicate that way, but only that if they require to take land in order to make a road to their works they are to

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indicate that. In my opinion, the decision of the Court below was right, and the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion, and I confess I think it is a very clear case.

The question is whether the Defendant company has any right of user over this way between two parts marked A and B on the map. That question must mean whether the Defendant company have any right of user over this road, assuming that the premises remain in their present state. We are not asked to speculate or conjecture whether they will have a right of user under some other circumstances different from the present. I only mention that, to prevent it being supposed that the company may not do something on the ground marked by them, which may destroy the right of way which at present exists between A and B. This private road or way which is claimed is a way to the stable which was sold to the company by the conveyance of the 14th of August, 1875.

Now the first matter we have to consider is whether, assuming this were a conveyance between ordinary individuals, the right of way to this stable would not pass; and the second point which will have to be decided is whether any distinction arises owing to the fact that the grantor here is granting to a railway and the grantees are the company who take. First, as to the terms of the conveyance, I think that this is a pure case of construction of the conveyance. In considering this conveyance in reference to rights like rights of way, and I put aside apparent easements for the moment, the cases fall into two classes—first of all, cases where rights of way arise by simple implication, and, secondly, where they arise owing to the express words of the conveyance. In the first class of cases, namely, cases of implication, it may be assumed, for the moment, that there are no words which indicate an intention of the grantor about the right of way, but we are left to gather it from the fact that he has made a grant of premises to which this right of way is, or is supposed to be, annexed. The rule about rights of way which arise from implication is simply this, that on a severance of two properties,

anything like a right of way, or any other easement which is used, and which is reasonably necessary for the reasonable and comfortable use of the part granted, is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual. When two properties are severed the parties to the severance, both the man who gives and the man who takes, intend that such reasonable incidents shall go with the thing granted as to enable the person who takes it to enjoy it in a proper and substantial way. This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary. Here we have express words, and what we have to decide is whether this is a way which the owner, by appropriate language, has shewn an intention to grant. Now let us look, first of all, at the facts. The facts are that the owner has granted the stable, and that this is a hard-beaten road which has been the only way by which access to the stables has been had. There were doors to the stable leading on to the field, and not facing to the road itself. But this road between A and B has really been the path to the stables. Let us see what the grantor has said. He has said that he grants the premises, including the stables, "together with the buildings, erections, sheds, walls, hedges, fences, trees, ditches, rights, members, and appurtenances whatsoever to the several pieces or parcels of land and hereditaments hereby granted and conveyed, or otherwise assured or intended so to be, or any of them belonging or in any wise appertaining, or deemed, taken or known, held, occupied, or enjoyed as part, parcel, or member thereof." It is quite true that the words "part, parcel, or member thereof," seem somewhat inapt to apply to an easement of a right of way which cannot be said to be "part, parcel, or member" of the premises granted, still, taking the thing broadly, and endeavouring to judge what the intention of the parties, as expressed by their language, is, it seems to me that the grantor intended to give, and that the company should have, all such rights in the nature of rights of way as were *de facto* occupied or enjoyed at that time as appurtenant to the premises. It is quite true that this at the moment of the

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grant was not a right of way. It was only a way. Does that make a difference? That, again, is a question of construction, and the authorities which have been cited, from *Thomson* v. *Waterlow* (1) downwards, are really authorities, it seems to me, on the construction of similar deeds, which may be used for the purpose of edification, but are not actually conclusive. In *Thomson* v. *Waterlow*, which was decided by the then Master of the Rolls, Lord *Romilly*, it was supposed that a distinction must be made between the cases where some road or right of way had existed before the unity of possession, and that in that class of cases words like these might revive a right of way which had previously existed but would not operate to create a right of way which had never been a right of way before, but had only been a way used during the unity of possession. That decision was disapproved of by the Court of Queen's Bench in the case of *Kay* v. *Oxley* (2), and Lord *Blackburn* says, "If the words had been 'together with the right of way which *Green, de facto*, has enjoyed of passing over the private farm-road,' supposing that had been a right of way never enjoyed as of right, but merely a way *de facto* used, still I think the words would have clearly enough created a right of way," that is to say, he would have construed the words as creating a right of way, even if they had been a little obscure. A similar view was taken in this Court in *Watts* v. *Kelson* (3), though it was not necessary for the decision. It is not actually a case in point, but the point which had been raised in *Thomson* v. *Waterlow*, and which it is necessary for us to consider in the present instance, was considered again by Lord Justice *Fry* in the case of *Barkshire* v. *Grubb* (4), where his Lordship said, after alluding to the point made in *Thomson* v. *Waterlow* by the Master of the Rolls, and in *Langley* v. *Hammond* (5), which had drawn a distinction between the rights of way which had existed before unity of possession and ways which had only been enjoyed *de facto* during the possession, "And accordingly the doubt which was introduced by those cases seems, I am happy to say, to have been dispelled by the cases of *Kay* v. *Oxley* and *Watts* v.

(1) Law Rep. 6 Eq. 36.
(2) Ibid. 10 Q. B. 360, 367.
(3) Law Rep. 6 Ch. 166.
(4) 18 Ch. D. 616, 622.
(5) Law Rep. 3 Ex. 161.

Kelson (1), which have restored the law as it had been settled by the earlier decisions." Then he quotes the passage from Lord *Blackburn's* judgment in *Kay* v. *Oxley* (2), which I have referred to. That seems to me really sense. It is still, I think, a question of construction. One must look at the particular words of every particular deed. But these cases, as summed up and expounded by Lord Justice *Fry* in the recent decision of *Barkshire* v. *Grubb* (3), shew this, that the mere fact that the way did not exist as a right of way before unity of possession, and was only enjoyed as a way before unity of possession, will not prevent the Court putting such a construction upon general words which, *primâ facie*, might apply to rights and not to ways enjoyed *de facto* only, as is to be gathered from the true intention of the parties. That, I think, is what the Lord Justice decided in *Barkshire* v. *Grubb*, and as he will give judgment in this case, I express my view in the hope that if I have misread his decision he will say so. Therefore, if this is to be taken to be a conveyance between ordinary parties, these words would create, to my mind, a new right of way as appurtenant to the use and enjoyment of the stables.

Is that view to be affected in any way by the mere fact that a railway company is one of the parties to this conveyance? Mr. *Littler* has put his point in two ways; he says first of all, that the known object of the conveyance here was not that the stable should be used as a stable, but that it should be pulled down, and therefore he says that restricts in some way the grant, or ought to induce us to put a different construction upon it from that which we should otherwise apply. But the known object of the conveyance, as has been pointed out by Lord Justice *Cotton*, does not raise any implication of a covenant to use the premises only for the purpose for which the parties know it is going to be used. The case where there is an implied covenant by a grantor not to derogate from his own grant, and to allow the premises to be used by the grantee for the purpose he knows they are intended to be used, is a converse principle which has nothing to do with such a proposition, or that for which it has been used as an illustration, and I do not think that in law, or sense, it can be said, that because the vendor knows, or thinks he has reason to know

(1) Law Rep. 6 Ch. 166. (2) Law Rep. 10 Q. B. 360, 367.
(3) 18 Ch. D. 616, 622.

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the vendee is going to use what he buys for a particular object, that therefore the vendee is to be assumed to have bound himself by implication never to use it for anything else. That I believe would introduce a principle for which there is no foundation in reason or law.

Then Mr. *Littler* also puts it in this way. He says it is contrary to the Act of Parliament that this should be used as a stable. In my opinion it is not. I take issue with him on the fact. It is perfectly true that railway companies only acquire land for the legitimate objects of their railway. Without considering in the present instance, which I do not think it is in the least necessary to do, under what circumstances railway companies can be prevented from making an improper use of the land they acquire by the statutory powers for railway purposes only, to my mind it is obvious here that there is not the faintest reason for thinking that the use of the stable, as a stable, during the interim period which elapses before it either becomes superfluous land, if it ever does become superfluous land, or before they put it to the use of their undertaking, would be contrary to law. They might not have of necessity to convert it for many years, and to say that during that interim period they should not be allowed to use the premises in the state in which they bought them would be contrary to sense, and I believe absolutely inconsistent with the train of thought which passed through the minds of those who decided both in the House of Lords, and in this Court, the cases of which *Hooper* v. *Bourne* (1) is an illustration. The class of cases where railway companies are prevented from depriving themselves of the power of using their land for the railway purposes for which they have bought it, are totally, it seems to me, beside the present case. Therefore I come back to what I started with, that this is a question upon the construction of the deed, and upon the true construction of this deed I think this right of way passed, and that the appeal fails.

FRY, L.J.:—

I agree with my learned Brothers in this case. The first question, and I think the whole question, is one of construction. It appears to me that the cases of *Watts* v. *Kelson* (2) and *Kay* v.

(1) 3 Q. B. D. 258; 5 App. Cas. 1.

(2) Law Rep. 6 Ch. 166.

Oxley (1) have laid down a general principle of construction which I think may be stated in this way, that if one person owns both *Whiteacre* and *Blackacre*, and if there be a made and visible road over *Whiteacre*, and that has been used for the purpose of *Blackacre* in such a way that if two tenements belonged to several owners there would have been an easement in favour of *Blackacre* over *Whiteacre*, and the owner aliened *Blackacre* to a purchaser, retaining *Whiteacre*, then the grant of *Blackacre* either "with all rights usually enjoyed with it" or "with all rights appertaining to *Blackacre*," or probably the mere grant of *Blackacre* itself without general words, carries a right of way over *Whiteacre*. That appears to me to be the result of those cases.

Now in the present case there is no doubt that there was a made and visible way used for these stables. What is the conveyance to the company? It grants among other things the stables, and it grants them (I have selected such words as appear to me to be material) "together with all rights to the said hereditaments hereby granted, or any of them belonging or in anywise appertaining or enjoyed as part or parcel or member thereof." Now it is plain the parties to this conveyance considered that rights could be enjoyed as part, parcel, or member. What the precise legal effect of these words is, may not be very clear, but it is quite plain that used as they are by the parties to this instrument, they must mean a right relating to or enjoyed with or for the benefit of a tenement or part of a tenement. Now this visible road was used in fact at the time of the conveyance, and was enjoyed therefore as if it were a right attached to the stables, and in my judgment that passed by the effect of the instrument itself. If there were any doubt about the point I should think that the reference to the plan upon the conveyance made it more plain, because there the road in question is indicated, like all the other roads, by the colour brown. That seems to me, as it appeared to Mr. Justice *Chitty* in the Court below, to be an indication of the intention that as between the parties this road should be treated as a road.

Does it then make any difference that the grantee instead of being a private individual is a railway company? I think it

(1) Law Rep. 10 Q. B. 360.

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makes no difference. The point has been argued in two ways. In the first place it has been said that the words being ambiguous the Court ought to give a narrower interpretation to the words where the grantee is a company having limited powers and limited objects than it would in the case of a private owner. But in my opinion the words in this case are not ambiguous, and there is really no doubt as to the meaning of them. Therefore that argument fails.

It was then said that there is an implied reservation to the grantor of this right of way in such a manner as to prevent the grant taking effect for the benefit of the company; but in the first place there is the broadest distinction between implied grants—grants which may be implied for the object for which the grant is made—and implied reservations or regrants. That is a point which this Court had to consider not very long ago (1), and the majority of the members of the Court felt that distinction to be a very broad one. It appears to me as a general rule that a person who desires to reserve a right to himself must do so by express words, and there is great difficulty, if not impossibility, in holding that a right of this sort could be reserved by implication. But in the present case to hold that there was such a reservation would in my judgment be inconsistent with the terms of the deed, and nothing can be plainer than that such an implied reservation cannot be raised as would be inconsistent with the express terms of the instrument. That appears to me to be enough to determine the case. In saying that I am not in any way withholding my assent from the other ground referred to by Lord Justice *Cotton* in particular, and Lord Justice *Bowen* also, and I assent to the view which they have expressed on those points.

Solicitors for the Plaintiff: *Bolton, Robbins, Busk & Co.*, for *S. Cater, Plymouth.*

Solicitor for the Defendants: *R. R. Nelson.*

(1) *Russell* v. *Watts*, 25 Ch. D. 559.

M. W.

In re MASSEY & CAREY.

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Solicitor—Bill of Costs—Power of Taxing Master to disallow Items caused by Negligence.

The Taxing Master in taxing a bill of costs between a solicitor and his client has power to disallow the costs of proceedings in an action conducted by the solicitor which were occasioned by the negligence or ignorance of the solicitor. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to bring an action for negligence against the solicitor.

THIS was an appeal from a decision of Mr. *H. F. Bristowe*, the Vice-Chancellor of the county palatine of *Lancaster*.

Messrs. *Massey & Carey*, the Appellants, who were solicitors at *Liverpool*, acted as solicitors for Mr. *Wood* in an action in the *Lancaster* Court, in which he was defendant. Mr. *Wood* was also a solicitor, and resided at *Wigan*.

Mr. *Wood* obtained the common order for taxation as between solicitor and client of Messrs. *Massey & Carey's* bill of costs in relation to the action. This order having been made, Messrs. *Massey & Carey* delivered their bill of costs, in which half fees were charged as in a bill between a solicitor and his town agent. This bill was accordingly referred to the District Registrar for taxation.

In the course of the action the Plaintiff delivered a reply to the Defendant's statement of defence, and Messrs. *Massey & Carey* sent it to Mr. *Wood*. He said nothing to them, and they made no suggestion to him about it, and no rejoinder was delivered within the time limited by the Rules of Court. After the expiration of that time counsel advised that it was desirable for the interests of the Defendant that a rejoinder should be put in. Accordingly, application was made to the Court for leave to deliver a rejoinder notwithstanding the time had expired, and on that occasion Mr. *Carey* made an affidavit stating that he was acting as solicitor for the Defendant and had conducted the action for him, and that the omission to file a rejoinder had happened "by inadvertence." Leave was granted by the Court upon the terms of the Defendant paying the costs of the appli-

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cation. These costs were paid by Messrs. *Massey & Carey*, and were charged against Mr. *Wood* in their bill of costs.

The Registrar disallowed these costs, on the ground that they had been caused by the negligence of the solicitors.

Messrs. *Massey & Carey* appealed to the Vice-Chancellor, contending that the bill ought to have been taxed as between a solicitor and his town agent, and not as between a solicitor and his client; and also that the Registrar had no power to disallow the costs of the proceedings relating to the rejoinder. The Vice-Chancellor having affirmed the decision of the Registrar, Messrs. *Massey & Carey* appealed to the Court of Appeal.

Clare, for the Appellants :—

We object, in the first place, to the whole principle of the taxation, which is between solicitor and client, whereas it ought to have been between solicitor and town agent.

In the second place, the Registrar, acting as Taxing Master, had no power to disallow items on the ground of the negligence of the solicitor. The proper remedy for the client is to bring an action against his solicitor for negligence. The Taxing Master has no power to consider that question: *The Papa de Rossie* (1); *Matchett* v. *Parkes* (2).

[Fry, L.J., referred to *In re Bolton* (3).]

But assuming that the Registrar had jurisdiction to strike out the items, he has not exercised it rightly. It is not clear that there was any mistake at all, for it is not shewn that it was really necessary to file a rejoinder. And if there was a slip, the Appellants were not responsible for it. They sent the reply to *Wood*, who kept it for some time, and whether the Appellants were acting as his solicitors or simply as his agents, it is clear that he had assumed the responsibility of advising as to the proceedings in the action. If, therefore, there was any slip it was made by *Wood*, not by the Appellants.

Rotch, for the Respondent, referred to *Dixon* v. *Wilkinson* (4), but was stopped by the Court.

(1) 3 P. D. 160.
(2) 9 M. & W. 767
(3) 9 Beav. 272.
(4) 4 De G. & J. 508.

COTTON, L.J.:—

This is an appeal by Messrs. *Massey & Carey* from a decision of the Vice-Chancellor of the county palatine of *Lancaster* refusing to entertain an objection to the taxation of the Appellants' bill of costs.

The taxation must be treated as a taxation between a solicitor and his client. The taxation was claimed by *Wood*, who alleged that Messrs. *Massey & Carey* were his solicitors, and asked for taxation on that ground. It was an *ex parte* order, which did not indeed bind the solicitors, but they did not apply to discharge the order as they might have done if the allegations made in the petition were not true. But the case does not stop there, for in the affidavit sworn by Mr. *Carey* in his application for further time, he stated that he was acting for *Wood* as his solicitor in the action. Therefore, in my opinion, it must be taken as a taxation between solicitor and client.

Now we must consider what the items are which the Registrar has disallowed. It appears that a reply had been delivered by the Plaintiff in the action, and Messrs. *Massey & Carey* sent it to *Wood*. He said nothing, and they did nothing, but after the time had expired for putting in a rejoinder, counsel advised that a rejoinder ought to be put in, and thereupon a summons for further time to deliver the rejoinder was taken out by the Appellants, and the costs of those proceedings have been disallowed by the Registrar. In my opinion he was quite right in disallowing them. The proceedings were necessary only for the purpose of extending the time for putting in the rejoinder after the proper time had been allowed to expire. Therefore they were not proceedings necessary for the due conduct of the action, but necessary only to remedy a slip which the Appellants had themselves made.

It was said that the Taxing Master had no jurisdiction to disallow charges on the ground of negligence, but that an action for negligence ought to be brought by the client against the solicitor. In my opinion the question here is not the same as that which would arise in an action for negligence. The question here is whether the client should be charged with costs which are referable only to amending a slip made by the solicitor. We have

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made inquiries of the Taxing Masters both of the Chancery and Common Law Divisions as to what has been their practice in such matters. Undoubtedly the Taxing Masters in the Chancery Division are more liberal in entertaining objections on the ground of negligence, perhaps because the order for taxation in the Chancery Division directs payment on taxation, while the order in the Common Law Division is only for a stay of proceedings on payment. Probably at Common Law if the objection was that the whole action had failed by reason of the negligence of the solicitor that would be considered a question proper to be decided not by the Master but in an action by the client for negligence. Whether that would be so also in the Chancery Division I do not know; but it is not necessary to consider that point now, for both at Common Law and in Chancery the Taxing Master will entertain the objection that a certain step in the action would not have been necessary if the solicitor had done his duty in the ordinary way, and would hold that the costs of such a step were not properly chargeable to the client. No doubt in the case of *Matchett* v. *Parkes* (1) Baron *Parke* said, "The Master had certainly no authority to entertain the question of negligence; that is a matter for the consideration of a jury." But any expression of a Judge must be taken with reference to the facts of the case before him, and in that case it was not a question of particular steps in the action, but the whole action had been rendered useless to the client by the negligence of his solicitor. Therefore it was a question which ought properly to be left to a jury in an action. In the present case I am of opinion that the Registrar had power to disallow, and was right in disallowing, the items in question.

Then it was contended that *Wood* had relieved his solicitors from the duty of advising him as to delivery of a rejoinder. But this being a taxation as between solicitor and client and not as between solicitor and agent, the *onus* is on the solicitors to shew that their client had undertaken the duty of advising as to the conduct of the action. No evidence has been adduced in support of this contention except the mere fact that the Appellants had undertaken to do the work on agency charges. But

(1) 9 M. & W. 767, 768.

there is nothing to prevent solicitors while acting as solicitors for a client in an action agreeing that they shall only make agency charges. Beyond this there is no evidence that *Wood* relieved his solicitors from the duty of advising him as to the conduct of the action. That contention therefore fails.

It was also objected that we have no proof that the rejoinder was necessary; and if so, it is urged, how can it be said that the Appellants made a mistake in not delivering one? But that is met by Mr. *Carey's* own affidavit where he says that the rejoinder was omitted to be delivered "by inadvertence." Perhaps the Appellants ought not to be conclusively bound by this expression, but it shews that the *onus* is on them to shew that the rejoinder was not reasonably necessary; and they have not attempted to do this. On the whole, I am of opinion that the decision of the Vice-Chancellor was right, and that this appeal must be dismissed.

Bowen, L.J.:—

I am of the same opinion. The Taxing Master when taxing a bill of costs relating to proceedings in an action is not bound to allow the costs of proceedings which are apparently unnecessary, and which could only be held to be proper if it were shewn that they were caused by the act of the client, not by the act of the solicitor. For the purpose of this taxation the order treated *Massey & Carey* as being *Wood's* solicitors. They were his solicitors, though employed on agency terms. In a free country you may make any bargain you like. Here the only bargain was as to the scale of remuneration. Therefore, treating them as solicitors, with a special undertaking as to the scale of fees, the Registrar finds that certain costs were inexcusable. He seems to me to have been right in disallowing these items. It is true that at Common Law the Taxing Master has not the power to decide the question of negligence in all cases. If the negligence goes to the loss of the whole action he cannot entertain the question; but if it relates only to certain proceedings in the action he can. Otherwise the unfortunate result would be that if there was a question as to the propriety of a particular step in the action, as to which no man is better able to decide than the Taxing Master,

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you place the client in the position that he would have to pay the charge and then bring an action to get it back from the solicitor. It seems to me that the Taxing Master has the power to decide, and that he ought to decide such questions without prejudice to the right of the client to bring an action. In *Cliffe* v. *Prosser* (1) it was decided that the Master may disallow costs occasioned by the negligence of a solicitor. In that case the action had been commenced by the solicitor in assumpsit instead of in covenant, whereby the proceedings became useless, and the Court made an order absolute to strike out the items objected to without prejudice to the solicitor's right to bring an action for them. That shews that the Master had jurisdiction to allow or disallow items on the ground that the costs were unnecessary. That is the real question here, whether these costs were unnecessary, and I think the Master was right in deciding that they were.

I agree also as to the other points.

Fry, L.J.:—

To my mind it is very clear that the Taxing Master has power to decide whether any particular items charged are proper, and to disallow them if they are improper. It is equally clear that no item can be proper which is due to the negligence or ignorance of the solicitor. Therefore, the only question is, are these items proper charges, or do they arise from the negligence of the solicitor? We must, therefore, consider who was responsible for the slip which has occurred? *Carey*, when the matter was fresh in his memory, stated in his affidavit that he was *Wood's* solicitor, and that it was through his inadvertence that the rejoinder was not delivered. But afterwards the Appellants say that *Wood* was the person who assumed the duty of seeing if the rejoinder was necessary. They have failed to shew that this was the case. And now, when it serves their purpose, they say that they were acting as the agents of *Wood*. In my opinion we are driven to the conclusion that the Appellants were responsible for the slip, and that these items were properly struck out. It appears to me that our decision is in accordance with *In re Bolton* (2). In that case the

(1) 2 Dowl. 21. (2) 9 Beav. 272.

word "inquiry" had been substituted by mistake for "sale" in the decree. The defendant's solicitor ought to have had the error corrected, and he requested the plaintiff's solicitor to get this done, but he failed to do so by reason of ill-health. The defendant was obliged to present a petition to remedy the mistake, and the Court made the defendant's solicitor bear the costs of the petition.

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Solicitors: *Massey & Hains, Liverpool; A. S. Mather, Liverpool.*

M. W.

In re GRIFFITHS. GRIFFITHS *v.* LEWIS.

C. A. 1884 *March* 11.

[1878 G. 250.]

Practice—Costs of Executor of defaulting Executor—Defendant appearing in two Capacities—Apportionment of Costs.

Where an action was brought for the administration of a testator's estate against the executor of a defaulting executor, whose estate was insolvent:—*Held*, that the Defendant being before the Court in a double capacity should have his costs of taking the accounts of the original testator's estate and half the rest of the costs of the action out of the estate.

Palmer v. *Jones* (1) and *Kitto* v. *Luke* (2) followed.

THIS was an appeal from part of an order of Mr. Justice *Chitty* so far as related to the costs of the Defendant *William Lewis*.

David Griffiths, by his will, dated the 15th of December, 1869, gave certain real and personal property to *T. Griffiths* and *Talieson Evans*, in trust for his wife for life, and after her death for his daughter, the Plaintiff; and he appointed *T. Griffiths* and *Talieson Evans* his executors.

The will was proved in 1874 by *Talieson Evans* alone, the other executor having died.

The testator's widow died in May, 1878.

Talieson Evans died in November, 1878, having by his will appointed the Defendant *W. Lewis* his sole executor.

The Plaintiff brought the present action against the Defendant

(1) 43 L. J. (Ch.) 349. (2) 28 W. R. 411.

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for the administration of the real and personal estate of *D. Griffiths.*

On the 2nd of May, 1879, a decree for the administration of the estate was made, and, among other things, an account was ordered of the personal estate of *D. Griffiths,* and the rents and profits of his real estate received by *T. Evans* and by the Defendant *W. Lewis* as his executor, and the Defendant was appointed receiver of the estate.

The Chief Clerk found by his certificate that a sum of £228 was due from the estate of *T. Evans* on account of the personal estate of *D. Griffiths,* and that £50 was due from the Defendant *W. Lewis* for money received by him after the death of *T. Evans* on account of the personal estate of *D. Griffiths.* He also found that the estate of *T. Evans* was insolvent.

When the cause came on for further consideration before Mr. Justice *Chitty* he made an order that the Defendant should pay into Court the £50 due from him, which was accordingly done, and gave directions for paying into Court and investing the assets of *D. Griffiths.*

With respect to the costs His Lordship ordered that the Defendant should have out of *Griffiths'* estate his costs as between solicitor and client of taking the accounts of the estate of *D. Griffiths,* and his costs and charges properly incurred in the administration of the trusts of the will, and one-half the remaining costs of the suit; and it was ordered that he might retain a sum of money which he had in his hands belonging to the estate of *T. Evans* towards the other half of the remaining costs of the suit.

From this order, so far as it regarded the costs, the Defendant appealed.

Maclean, for the Appellant:—

The question being one of principle is a proper subject for appeal. I contend that the Defendant is entitled to his whole costs of the suit out of *Griffiths'* estate, except the costs of taking the accounts of *Evans'* estate, whereas the Judge has allowed him only half the general costs of the suit. The Defendant has duly accounted for all the property of *Griffiths* which has come

into his hands, and has done nothing wrong. The estate of *T. Evans* being insolvent the Defendant had nothing to account for in respect of it. The Defendant ought, therefore, to have all his costs: *Samuel* v. *Jones* (1); *Bowyer* v. *Griffin* (2); *Smith* v. *Dale* (3); *Lewis* v. *Trask* (4); *Clare* v. *Clare* (5); *Hannay* v. *Basham* (6).

[FRY, L.J., referred to *Haldenby* v. *Spofforth* (7).]

Sturges, for the Plaintiff:—

The Defendant is executor of *Evans*, the defaulting executor, as well as of the original testator. He cannot have the costs of the action so far as it is caused by the default of *Evans*. It is difficult to separate these costs from the other costs of the action, and the Judge had a discretion to apportion them as he thought best. He followed the usual course in similar cases: *Palmer* v. *Jones* (8); *Kitto* v. *Luke* (9).

Maclean, in reply.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Chitty* in a creditor's administration action as to costs. The Defendant is in this unfortunate position. He is executor of a deceased executor who was a defaulter in respect of his testator's estate. The estate of the deceased executor whom the Defendant primarily represents is not sufficient to pay the whole sum due from him to the estate of *Griffiths*, the original testator. The question on this appeal is what is the right order to make as to the costs of the Defendant. The order made by Mr. Justice *Chitty* was that the Defendant should be allowed out of *Griffiths'* estate his costs as between solicitor and client of taking the accounts of the testator *Griffiths* and half the remaining costs of the suit, towards which he was to retain a sum in his hands belonging to *Evans'* estate. It is

(1) 2 Hare, 246.
(2) Law Rep. 9 Eq. 340.
(3) 18 Ch. D. 516.
(4) 21 Ch. D. 862.
(5) 21 Ch. D. 865.
(6) 23 Ch. D. 195.
(7) 9 Beav. 195.
(8) 43 L. J. (Ch.) 349.
(9) 28 W. R. 411.

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contended that the Defendant ought to have all his costs of the action paid to him out of *Griffiths'* estate, except merely the cost of taking the accounts of *Evans'* estate.

The Defendant is here in two capacities: in one capacity he is trustee for the Plaintiff, in the other he is the personal representative of a person against whom the Plaintiff has an adverse claim for a debt due to the testator's estate. The strict order would be to allow the Defendant out of *Griffiths'* estate all the costs incurred solely with reference to *Griffiths'* estate, but as to the costs incurred by the Defendant solely as representative of *Evans*, the person indebted to that estate, he ought to be allowed them solely out of *Evans'* estate; and as to the costs incurred with reference to both estates he ought to be allowed half of them out of *Griffiths'* estate. That is substantially the principle on which the Judge has proceeded; but as it would be very difficult to distinguish the costs so accurately as this, in order to avoid the expense of such an inquiry the Judge has given the Defendant the costs of taking the accounts of *Griffiths'* estate out of that estate, and has given him one-half the rest of the costs of the action. The division of the costs is not mathematically accurate, but in my opinion we should be doing wrong if we were to interfere with the exercise of his discretion. The appeal must, therefore, fail.

BOWEN, L.J.:—

I cannot speak with the authority of the other members of the Court. But it would be very unfortunate if the Court had come to any other conclusion. The Defendant comes into Court in two capacities. He must fail in his contention unless he can shew he is entitled to his costs in both capacities. In one capacity he is entitled to costs, in the other capacity he is in the same position as if he were an executor sued for default, in which case he would not be entitled to any costs. There must be some solution to the difficulty. The Judge in the Court below has taken a course which is not strictly correct, but was adopted ten years ago as sufficiently accurate in *Palmer* v. *Jones* (1) and followed in *Kitto* v. *Luke* (2). I think we ought to allow some discretion to

(1) 43 L. J. (Ch.) 349. (2) 28 W. R. 411.

the Judge in such a matter, and that we ought not to entertain an appeal which would only result in expensive inquiries.

FRY, L.J.:—

I am of the same opinion. In this case the same person is legal personal representative of different persons whose estates are being administered. Strictly speaking the costs of the action are divisible into three categories. First, those incurred in taking the accounts of the original testator. Secondly, those which are incurred in seeking relief against the defaulting executor. Thirdly, those which come under neither of those heads. The first set of costs ought to be borne by the estate which is being administered; the second ought to be borne by the estate of the defaulting executor; and the third ought to be divided. In substance the Judge has adopted this plan. There may be cases in which it may be proper and necessary to follow the strict rule, but in other cases it would lead to great complication and expense. I think that this case is one of the latter description. The Judge thought it best to deal with the costs as he has done, and I have not heard anything to lead me to overrule his decision. I therefore agree that the appeal must be dismissed.

Solicitors: *Young, Jones, Roberts & Hale; H. Wrentmore.*

M. W.

C. A.
1884
March 14.

HILL *v.* HART-DAVIS.

[1882. H. 2755.]

Practice—Striking out Affidavit for Prolixity—Rules of Supreme Court, 1883, *Order* XXXVIII., *r.* 11; *Order* LXV., *r.* 27, *sub-s.* 20.

Although there is no rule of Court specially giving power to the Court to take pleadings or affidavits off the file for prolixity, yet the Court has an inherent power to do so in order to prevent its records from being made the instruments of oppression.

Where however an affidavit of documents was of oppressive length, but it appeared to the Court that delay and expense would be caused by filing a fresh one, the Court permitted it to remain on the file but ordered the party filing it to pay the costs of it.

THIS was an application to take off the file an affidavit of documents on the ground of prolixity and irrelevancy.

The action was brought by the trustees of the *Independent Mutual Brethren Friendly Society* to restrain the publication of certain statements made respecting the affairs of the society, and alleging that it was insolvent, contained in a circular issued by the Defendant (1).

The Defendant, in his defence, justified the statements in the circular.

An order having been made on the application of the Defendant for the production of documents by the Plaintiffs, the Plaintiffs put in an affidavit which was of great length. Among other things, 4216 letters were set out separately by their dates and names of the writers and recipients, and a vast number of receipts for sick allowances from the various branches of the society. The Defendant was charged £19 2*s.* for the copy of the affidavit furnished to him by the Plaintiffs.

Mr. Justice *Kay*, before whom the application was made, ordered the affidavit to be taken off the file as being oppressive and irrelevant, and by its prolixity an abuse of the practice of the Court, and ordered that the Plaintiffs should pay the costs occasioned by it, including the Defendant's payment of £19 2*s.*, and also the costs of the application.

(1) 21 Ch. D. 798.

From this order the Plaintiffs appealed.

Hastings, Q.C., and *Colquhoun*, for the Appellants :—

The documents scheduled in the affidavit are relevant to the issue in the action; at all events the Court cannot decide on their relevancy on this motion. There is nothing scandalous in the affidavit, and the only real complaint is its length. If the Plaintiffs have done wrong in this respect the proper way of punishing them is by the infliction of costs. It is quite contrary to the practice of the Court to take an affidavit off the file for this reason: Order XXXVIII., rule 11; Order LXV., rules 20, 21, 29. The only instance of such an order is *Walker* v. *Poole* (1), where Mr. Justice *Kay* ordered an affidavit to be taken off the file, but that case is not binding on this Court. If the affidavit is destroyed, as it will be if it is taken off the file, the Plaintiffs will have to prepare a new one, which would cause delay and expense to both parties (2).

[COTTON, L.J., referred to *Drake* v. *Symes* (3).]

W. Pearson, Q.C., and *Des Graz*, for the Defendant:—

The Court has an inherent jurisdiction to order any document to be taken off the file which is vexatious and oppressive. The object of this lengthy affidavit can only be to cause unnecessary costs to the Defendant. The Defendant had no other way to recover the costs to which he has been put except to make this motion: *Taylor* v. *Batten* (4); *Bewicke* v. *Graham* (5).

Colquhoun, in reply.

COTTON, L.J. :—

This is an appeal from an order of Mr. Justice *Kay* ordering an affidavit of documents filed by the Plaintiffs to be taken off the file, and that the Plaintiffs should pay the costs occasioned

(1) 21 Ch. D. 835.

(2) It was stated in the course of the argument that when a document is ordered to be taken off the file, the practice is not to return it to the party who placed it there, but to destroy it by burning.

(3) 2 D. F. & J. 81.

(4) 4 Q. B. D. 85.

(5) 7 Q. B. D. 400.

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by it. The Plaintiffs have appealed from this order, and they have argued that the Court ought not to order the affidavit to be taken off the file, and that such a course would be contrary to the practice of the Court. They contend that if a document is alleged to be irrelevant or improper the right order is to refer it to the Taxing Master, and if it is found to be so, to make the party filing it pay the costs. It is further contended that this affidavit is not irrelevant or unnecessarily prolix. In my opinion the Appellants' contention cannot be maintained. It is better not to give an opinion at the present time whether the documents referred to in the affidavit are relevant, but whether they are so or not, I am of opinion that they are set out at unnecessary and improper length. They ought to have been set out in bundles, and scheduled and numbered in such a way that the Defendant might have asked for those which he wanted to see, specifying them by their numbers. The conclusion I have come to is that the affidavit is unnecessarily and oppressively long. The question is, however, what order ought to be made. We are of opinion that a different order to that made by Mr. Justice *Kay* would be better. This would not be at variance with the principle on which he acted. I agree that although the rules contain no provision for taking a document off the files for prolixity, yet it is the duty of the Court to see that its files are not made the instruments of oppression, and that without any provision in the rules the Court has the power, and it is its duty, to order oppressive documents to be taken off the file, even though this should result in their being burnt. But in the present case the Defendant has got a copy of the affidavit in question, and if it is taken off the file and destroyed the Plaintiffs will have to prepare another, and the Defendant will have to wait while they do so. While therefore I quite affirm the principle on which the learned judge acted, I think it will be better to order the Plaintiffs to pay to the Defendant the amount of costs, £19 2*s*. less £2, which would have been the cost of an affidavit of proper length. The Plaintiffs must pay the costs which they have been ordered to pay in the Court below, and the costs of this appeal. And at no further stage of the action will the Plaintiffs be allowed any costs of this affidavit.

There is another point to which I wish to allude. By Order LXV. rule 11, the Court has power to call upon a solicitor to shew cause why costs which have been improperly incurred should not be disallowed, and to order the solicitor to pay to his client any costs which may have been improperly incurred if he has been ordered to pay them to the opposite party. At present the Court will make no such order in the present case. This will be a matter between the Plaintiffs and their own solicitor.

BOWEN, L.J.:—

I am of the same opinion. I think the order, as modified in the way mentioned by Lord Justice *Cotton*, will meet the purposes of justice in this case without throwing doubt upon the larger jurisdiction of the Court to take off its files documents which have been placed there for purposes, not of justice, but of injustice. It is not denied that the Court has such jurisdiction, though it may not have been the practice of the Court since the Judicature Act to take documents off the file merely for prolixity. Yet it is a power which could be exercised if necessary. Every Court must have the power to protect its own records from being abused. I prefer not to define what constitutes oppression or vexation. It is better to determine in each case whether the circumstances are such as to come within a perfectly intelligible expression.

FRY, L.J.:—

I am of the same opinion. I am not inclined to express any opinion whether the documents set out in the affidavit are relevant or not. But assuming that they are, it is perfectly plain to my mind that they might have been set out in a way which could not have been oppressive. There is a prolixity in this affidavit of which no account can be given except a desire to cause vexation and costs to the Defendant. I agree with the proposed order.

Solicitors: *Montagu Scott & Baker; Poole, Hughes, & Poole.*

M. W.

C. A.
1884
March 22, 24, 31.

GREEN *v.* HUMPHREYS.

[1882 G. 662.]

Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3 [*Revised Ed. Statutes, vol. i., p.* 705]—*Acknowledgment.*

J. H. was the trustee of a settlement by which the *T. B.* estate was settled on the wife of the Defendant for life to her separate use without power of anticipation. *J. H.* lent money to the Defendant, and for some time, with the wife's consent, the rents of the *T. B.* estate were applied towards payment of the debt, the wife giving receipts for them. In October, 1879, the Defendant wrote to *J. H.*, "I thank you for your very kind intention to give up the rent of *T. B.* next Christmas, but I am happy to say at that time both principal and interest will have been paid in full."

Held, that this was not an acknowledgment which would take the debt out of the *Statute of Limitations*.

Decision of Mr. Baron *Pollock* reversed.

THIS was an appeal by the Defendant from a decision of Mr. Baron *Pollock* (1).

The case made by the statement of claim was that *John Humphreys*, deceased, lent in 1846 and subsequently, divers sums of money to the Defendant under an agreement by which the Defendant was to pay interest at £5 per cent. on the amount which should for the time being be owing from him to *John Humphreys*. That *John Humphreys* was sole acting trustee of a settlement dated the 21st of March, 1851, by which an estate called *Tyn-y-Burwydd* was settled, in trust, during the joint lives of the Defendant and his wife, to pay the rents to the wife for her separate use, without power of anticipation. That *John Humphreys*, at the request of the wife, applied the rents towards satisfaction of what was due from the Defendant. That the wife gave receipts for the rents to the 29th of September, 1859, but from that time gave no receipts and no written authority to apply the rents towards the debt. That after 1859 accounts were from time to time stated between *John Humphreys* and the Defendant, in which *John Humphreys* was charged with the rents. That *John Humphreys* died in 1880, and the Plaintiffs were his executors.

(1) 23 Ch. D. 207.

That the Defendant's wife claimed from the Plaintiffs the rents from the 29th of September, 1859, and the Plaintiffs paid her the amount of such rents, being £328 1*s.* 2*d.* That the Defendant refused to allow this sum in the account of what was due from him. The Plaintiffs claimed an account of what was due from the Defendant to the estate of *John Humphreys*, with liberty to surcharge and falsify stated accounts, and for payment of what should be found due.

The Defendant set up the *Statute of Limitations*. The Plaintiffs in opposition to this, relied on a letter dated the 18th of October, 1879, written by the Defendant to *John Humphreys*, and containing the following passage:—

"I thank you for your very kind intention to give up the rent of *Tyn-y-Burwydd* next Christmas, but I am happy to say at that time both principal and interest will have been paid in full."

The rest of this letter related to the sale of a property for the purchase of which the Defendant was treating with the executors of a will of whom *John Humphreys* was one.

No letter from *John Humphreys* as to giving up the rent at Christmas was in evidence.

It was not disputed that the *Statute of Limitations* was a good defence to the action unless the above letter took the case out of the statute, which Mr. Baron *Pollock* held that it did, and gave a judgment directing an account as prayed, with liberty to the Plaintiffs to surcharge and falsify stated accounts. The Defendant appealed, and the appeal was heard on the 22nd and 24th of March, 1884.

Crossley, Q.C., and *Northmore Lawrence*, for the Appellant:—

To take a case out of the statute there must either be a promise to pay or such an admission of liability that a promise to pay can be implied from it. Here there are no words from which a promise can be implied, and the statute is a bar: *Morgan* v. *Rowlands* (1); where Lord *Blackburn* says that the acknowledgment must be such that a promise can be inferred in fact: *Chasemore* v. *Turner* (2); *Mitchell's Claim* (3); *Philips* v. *Philips* (4);

(1) Law Rep. 7 Q. B. 493.
(2) Ibid. 10 Q. B. 500.
(3) Law Rep. 6 Ch. 822.
(4) 3 Hare, 281.

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Smith v. *Thorne* (1). Mere general words as to an existing debt will not do; a specific debt must be referred to: *Parmiter* v. *Parmiter* (2). Here it is not shewn that the letter refers to this particular debt, there being nothing to identify "principal and interest" with any particular demand. The previous correspondence is not in evidence, and might give an entirely different colour to the case. The burden of proof is on the Plaintiffs to shew that the letter refers to this particular debt.

Higgins, Q.C., and *G. Henderson, contrà* :—

The Court has to put a construction on the document, and for that extrinsic evidence is admissible, there being an ambiguity.

[FRY, L.J. :—How are we to construe this letter without knowing anything of the letter to which it was an answer?]

We admit that if a letter refers to a debt not due from the writer it is not a sufficient acknowledgment, but if it is doubtful to what it refers the Court can look at the circumstances. This is not a conditional promise, but an acknowledgment importing a promise to pay, and it does not cease to import it because it is coupled with the expression of a hope that the debt will be paid in a particular way: *Sidwell* v. *Mason* (3); *Prance* v. *Sympson* (4); *Lee* v. *Wilmot* (5).

Crossley, in reply, referred to *Whippy* v. *Hillary* (6) and *Hart* v. *Prendergast* (7).

1884. March 31 COTTON, L.J. :—

This is an appeal from a judgment of Mr. Baron *Pollock*, sitting for Mr. Justice *Pearson*. The action was brought by the executors of Mr. *John Humphreys* against his brother, to recover a sum due from the Defendant. The defence was the *Statute of Limitations*, and the only question to be determined was whether a certain letter was sufficient to prevent the statute from operating.

The letter relied upon was part of a larger correspondence

(1) 18 Q. B. 134.
(2) 1 J. & H. 135; 3 D. F. & J. 461.
(3) 2 H. & N. 306.
(4) Kay, 678.
(5) Law Rep. 1 Ex. 364.
(6) 3 B. & Ad. 399.
(7) 14 M. & W. 741.

which is not in evidence, but I think that under the circumstances the absence of the rest of the correspondence does not materially influence the matter. It appears, either from the evidence or from the admissions, that at the time when the letter was written there was a property called *Tyn-y-Burwydd*, which was settled upon the Defendant's wife for life for her separate use, without power of anticipation, and that for some considerable time (under what circumstances does not exactly appear) the rent of that property had been retained by the testator of the Plaintiffs in part satisfaction of what was due to him from the Defendant on the account between them. That I think is material, because one of the arguments addressed to us was, that this letter did not refer to the particular debt due on this account. That argument, in my opinion, is erroneous; because we find in the letter these words: "I thank you for your very kind intention to give up the rent of *Tyn-y-Burwydd* next Christmas, but I am happy to say at that time both principal and interest will have been paid in full." Now we are entitled to put ourselves in the position of the parties to know to what that letter refers. As it was the fact that the rent of *Tyn-y-Burwydd* was retained on account of the debt which is claimed in this action, I come to the conclusion that the letter clearly refers to this debt.

That, however, does not settle the question, for what we have to do is, to see whether the letter complies with the conditions which must be complied with in order to take the case out of the operation of the statute 21 Jac. 1, c. 16. To take a debt out of the operation of that statute, there must be an acknowledgment or promise which, by the statute 9 Geo. 4, c. 14, must be contained in some writing signed by the party chargeable thereby. The letter relied upon in the present case was signed by the party chargeable; but what we must look to is this, is there, in this letter, any promise to pay the debt, or any such acknowledgment of a debt as will take the case out of the statute.

I do not think that it would be useful to go through a number of cases where different words have been held either to be sufficient or insufficient to take the case out of the statute on the ground of acknowledgment. It seems to me to be settled that the acknowledgment must be such as will lead the Court to infer

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(I use the word "infer" intentionally) a promise by the writer to pay the debt. The rule seems to be this, that if there is an absolute unconditional acknowledgment, not controlled by any other language in the letter, then the Court comes to the conclusion that by that acknowledgment the party intends a promise to pay that which he acknowledges to be due. It may be put in this way. If a man acknowledges by letter that a debt is due without anything more, the fair inference is that he intends to pay, and expresses by that writing his intention to pay the debt. What is necessary therefore is this, that there should be an absolute acknowledgment uncontrolled by anything else, an acknowledgment in such terms that the Court may properly infer from it an intention by the writer to pay the debt.

Something was said in argument about an expression used by Lord *Blackburn* in *Morgan* v. *Rowlands* (1), that the acknowledgment must be such that a promise may be inferred in fact and not merely implied in law. There was a discussion as to what that meant. In my opinion it is not necessary for the present purpose to decide that; but what I think the learned Judge must have meant was this, that an acknowledgment is not sufficient if it merely admits a state of circumstances from which a promise to pay would be implied by law, as for instance where goods are sent to a man at his request without any express contract, and the law implies an obligation to pay. What I think we must find from the writing is not merely an acknowledgment of such a state of circumstances as will throw a duty upon the writer to pay, but words of such a character that you may reasonably infer from the words a promise to pay. It may be put in this way, that on a fair construction of the language there must be an acknowledgment of the claim as one which is to be paid by the writer.

Now, if we look again at the words of this letter there is no express acknowledgment of any debt as a debt. That is quite clear. The words are these: "I am happy to say at that time" (that is at Christmas) "both principal and interest will have been paid in full." What that refers to is not to my mind very clear, whether it means that by that time the debt will be paid off out

(1) Law Rep. 7 Q. B. 493, 498.

of the rent (which would not be such an acknowledgment as that you could infer a promise to pay) or whether it refers to something else. As there is no positive acknowledgment, in my opinion this is not sufficient. Where there is an express acknowledgment of debt the subsequent expressions of the writer may not be sufficient to control the effect of that acknowledgment, but here there is no acknowledgment of debt *qua* debt. The writer only says that by a certain time both principal and interest will have been paid in full. If he had referred in terms to "my debt which I am sorry I cannot at present pay" probably the words would have been sufficient to constitute an express acknowledgment, but reading the sentence as it stands it cannot, to my mind, be taken as an uncontrolled admission of debt. There being, therefore, neither a promise in terms nor an uncontrolled acknowledgment from which a promise can be implied, I think that the case is not taken out of the statute, and that therefore the judgment of Mr. Baron *Pollock* must be reversed.

BOWEN, L.J.:—

I am of the same opinion. I regret that we have to add one more to the cloud of cases which are collected around this particular point. The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the Court applies the principle. It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment a promise to pay will be inferred. That was laid down by Lord *Tenterden* in *Tanner* v. *Smart* (1), and the proposition, as Chief Baron *Kelly* said in *Quincey* v. *Sharpe* (2), has never been disputed, and it has been restated over and over again in all the Courts.

Now, first of all, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still, if words are found combined

(1) 6 B. & C. 603, 606. (2) 1 Ex. D. 72.

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with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because, not merely is there found in the words something that expresses less than a promise to pay (which, as Lord *Bramwell* pointed out in *Lee* v. *Wilmot* (1), will not necessarily put an end to the implication of the promise to pay), but because the words express the lesser in such a way as to exclude the greater.

Let me apply those two tests, which I think are established, to this case. It seems to me that although there is here an acknowledgment of a debt in a sense, there is not a clear acknowledgment of a debt in any such way as to raise the implication of a promise to pay, but, on the contrary, only in such a way as to exclude the idea of a promise to pay, and to imply that the writer did not undertake to pay. On this ground it seems to me that the judgment of Mr. Baron *Pollock* ought to be reversed.

I say this with a considerable hesitation, because I believe that different minds might take opposite views of this letter. The difficulty, as so often happens, is not in ascertaining the law, but in taking the true view of the facts to which the law has to be applied.

FRY, L.J.:—

I am of the same opinion. In the present case no question arises with regard to a promise in writing. The only question is with regard to an acknowledgment in writing. Now, taking the passage which is relied upon, it presents to my mind in the first place this difficulty, that it refers to certain intentions which have been communicated by the receiver of the letter to the writer of the letter, and those intentions if we knew them might throw light upon the true construction of the passage which refers to them. But of the nature of those intentions we have no evidence. It appears to me that he who relies upon this letter as a written acknowledgment ought to have given us some information as to what the communicated intentions were, in order that by the light of that information we might have construed the writing.

But passing from that difficulty, and looking at the letter with

(1) Law Rep. 1 Ex. 364, 367.

such evidence as we have of the surrounding circumstances, is there a good acknowledgment of the debt? Now what is an acknowledgment? In my view an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received. It is not enough that he refers to a debt as being due from somebody. In order to take the case out of the statute there must upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt. Now in the present case the only reference to the debt is a statement that it will be satisfied, and a reference to it also as being the ground upon which certain rents which did not belong to the writer have been stopped. It appears to me, therefore, that that debt is referred to not for the purpose of admitting the debt to be due from the writer, but for the purpose of referring to its contemplated satisfaction, which will release the rents of the wife that have been stopped. I think that the words of the letter which have been referred to may be fairly paraphrased in this way, "I thank you for your very kind intention to let my wife receive the rents of her estate after next Christmas, but your kindness is apparent and not real, for by next Christmas the debt to satisfy which you have been stopping her rents will have been fully satisfied in some manner or another." That appears to me to be the best paraphrase which I can give to the sentence in question when I regard the surrounding circumstances of the case, and in that I find no acknowledgment that a debt is due from the writer.

I think, therefore, that the Plaintiffs' case fails, and that the judgment of Mr. Baron *Pollock* must be reversed.

Solicitors for Plaintiffs: *Hunters, Gwatkin, & Haynes.*
Solicitors for Defendant: *Davidson & Morriss.*

H. C. J.

C. A.
1884
Feb. 23;
March 7, 10;
April 3.

NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE COMPANY *v.* WHIPP.

[1880 N. 3020.]

Mortgage—Priority—Negligence of First Mortgagee in custody of Deeds.

C., the manager of a joint stock company, executed a legal mortgage to the company of his own freehold estate, and handed over the title deeds to them. The deeds were placed in a safe of the company, which had only one lock having duplicate keys, one of which was intrusted to *C.*, as manager. Some time afterwards *C.* took out of the safe the deeds, except the mortgage, and handed them to *W.*, to whom at the same time he executed a mortgage for money advanced to him by her, without notice of the company's security:—

Held, reversing the decision of the Vice-Chancellor of the Court of the County Palatine of *Lancaster*, that the mortgage of the company had priority over the mortgage to *W.*

The Court will postpone a legal mortgage to a subsequent equitable security: (1) where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence where such conduct cannot otherwise be explained; or (2), where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate.

But the Court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee.

THIS was an appeal by the Plaintiff company from a judgment of the Vice-Chancellor of the County Palatine of *Lancaster*.

On the 11th of January, 1878, *Crabtree*, who was the manager of the Plaintiff company, executed a legal mortgage of a freehold property, known as *Millbank*, to the Plaintiff company, to secure £4500, and, according to the conclusion drawn by the Court of Appeal from the evidence, *Crabtree*, at or about the same time, delivered the title deeds to the company, and received the £4500 from the company in cash.

On the 24th of May, 1878, *Crabtree* made a legal mortgage to the Plaintiff company of certain other freehold property to secure £2500, and the title deeds were (according to the conclusion at

which the Court of Appeal arrived on the evidence) delivered to the Plaintiff company. In respect to this mortgage it was not proved that the £2500 passed in cash from the company to *Crabtree*, but it was in the opinion of the Court of Appeal the true conclusion from the evidence, that at the date of the mortgage *Crabtree* was indebted to the Plaintiff company in a sum greatly exceeding £2500 beyond the previous £4500.

The deeds of the mortgaged properties were placed in a safe of the company, and were seen there on the occasion of the audit in May, 1878.

Crabtree, who, as already stated, was the manager of the Plaintiff company, was entrusted with one of the two keys which opened the one lock which secured the safe in which the deeds of the company were kept, and it appeared that in November, 1878, he produced the deeds in question to the Defendant's solicitor, Mr. *Milne Whitehead*, to whom *Crabtree* had applied for a loan on mortgage of these two properties. As the result of this application the Defendant, Mrs. *Whipp*, advanced £3500 to *Crabtree* on a mortgage, dated the 19th of December, 1878, of the two properties included in the Plaintiffs' securities, and she at the same time received from *Crabtree* the title deeds of the two properties, but not the mortgages to the Plaintiff company. The Defendant's mortgage was taken by her, and the mortgage money paid by her to *Crabtree*, in entire ignorance of the securities to the Plaintiff company.

Crabtree went into liquidation in November, 1879, and in the following month an order was made for winding up the Plaintiff company.

In 1880 the liquidator commenced, in the name of the company, this action, against Mrs *Whipp* and *Crabtree's* trustee in liquidation, for foreclosure. The trustee disclaimed, and the action was dismissed as against him. Mrs. *Whipp* put in a defence and counterclaim by which she asked that the securities of the Plaintiff company might be declared fraudulent and void as against her, or in the alternative that they might be postponed to her security, and that the company might be ordered to convey the property to her, subject only to such equity of redemption as it was subject to under her mortgage.

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The Vice-Chancellor held that the company ought to be postponed to Mrs. *Whipp*, and gave a judgment on that footing. The Plaintiff company appealed, and the appeal was heard on the 23rd of February, and the 7th and 10th of March, 1884.

Ambrose, Q.C., and *Maberly*, for the appeal:—

The Vice-Chancellor has misconceived the principle on which the Court deprives the owner of a legal first mortgage of the benefit of his position. There is no case in the books in which he has been postponed for mere negligence in the custody of the deeds. In *Hewitt* v. *Loosemore* (1) it was held only that making no inquiry for the deeds would postpone the legal mortgagee. There is this distinction here: the company did get the deeds and they had a right to suppose that their confidential servant would not commit a crime—they had a right to trust him.

[COTTON, L.J.:—You have to consider whether they can trust their agent with a security given by himself.]

Mere negligence in the custody of documents does not make a person liable for the use improperly made of them: *Baxendale* v. *Bennett* (2); so as to a corporate seal: *Bank of Ireland* v. *Evans' Charities* (3). There is no general duty to all the world that a man should be careful as to the custody of his documents: *Arnold* v. *Cheque Bank* (4). Then we come to the equity cases. *Evans* v. *Bicknell* (5) is the leading case. There Lord *Eldon* lays it down (6), that a first mortgagee is not to be postponed for parting with the deeds "unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence, that amounts to evidence of a fraudulent intention." *Martinez* v. *Cooper* (7) and *Hewitt* v. *Loosemore* adopt that rule. *Perry-Herrick* v. *Attwood* (8) went on the ground that the deeds were left with the mortgagor for the purpose of enabling him to raise money; *Briggs* v. *Jones* (9) goes on the same ground;

(1) 9 Hare, 449.
(2) 3 Q. B. D. 525.
(3) 5 H. L. C. 389.
(4) 1 C. P. D. 578.
(5) 6 Ves. 174.
(6) Ibid. 190.
(7) 2 Russ. 198.
(8) 2 De G. & J. 21.
(9) Law Rep. 10 Eq. 92.

Hunt v. *Elmes* (1) is a strong authority in our favour, as also *Ratcliffe* v. *Barnard* (2). In order to postpone a first legal mortgage there must be evidence of connivance or assistance in the fraud of the mortgagor.

W. W. Karslake, Q.C., and *Pankhurst, contrà* :—

The Appellants put it that the deeds came into the custody of the company, and that they were guilty of no negligence in trusting their manager; but as *Crabtree* had free access to the deed chest, the deeds in fact were never taken out of his custody. The negligence of the directors as to the deed chest was extreme—it was manifest that, if *Crabtree* had free access to it, he could deal with his own property as he pleased by suppressing the mortgages. It is said that the negligence must be such that the Court will on the ground of it impute fraud; but the rule is not so laid down in *Colyer* v. *Finch* (3). It is there said that to postpone the first mortgagee the party claiming by subsequent title must satisfy the Court "that the first mortgagee has been guilty either of fraud or gross negligence." *Roberts* v. *Croft* (4) lays down the rule in the same way.

[FRY, L.J. :—In the *Agra Bank* v. *Barry* (5) the rule appears to be laid down rather differently.

COTTON, L.J. :—In *Colyer* v. *Finch* (6) the expression is used that it must be negligence so gross as to make the mortgagee answerable for the frauds which he enables others to commit.]

Waldron v. *Sloper* (7) is for us.

[FRY, L.J. :—That is a case where the contest was between equitable incumbrancers. Can you take away the benefit of the legal estate from the first incumbrancer in favour of the second if there be no fraud?]

It may be done, though not often. *Worthington* v. *Morgan* (8).

[FRY, L.J. :—The question there was whether there was a purchase for value without notice.]

(1) 2 D. F. & J. 578.
(2) Law Rep. 6 Ch. 652.
(3) 5 H. L. C. 905, 928.
(4) 2 De G. & J. 1.
(5) Law Rep. 7 H. L. 135.
(6) 5 H. L. C. 905, 929.
(7) 1 Drew. 193.
(8) 16 Sim. 547.

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Perry-Herrick v. *Attwood* (1); *Briggs* v. *Jones* (2).

[COTTON, L.J.:—In both cases the decision went on the ground of authority—not of mere negligence.

FRY, L.J.:—If you give the key of the wine-cellar to your butler, does that enable him to make a valid pledge of your wine?]

Clarke v. *Palmer* (3) is almost identical with the present case. If there is any rule under which a first mortgagee having the legal estate can be postponed without having been guilty of actual fraud, and Judge after Judge has said that there is, that rule ought to be applied here. A mortgagee who knows that his mortgagor is in possession of the mortgaged property and yet suffers him to retain the title deeds, is wilfully enabling him to commit a fraud. In such circumstances he is bound to take care that the mortgagor has not the means of representing himself as an unincumbered owner. The decision in *Halifax Union* v. *Wheelwright* (4) is in our favour.

[BOWEN, L.J.:—That is one of the cases as to fraud in drawing cheques and other negotiable instruments, which are almost innumerable, and seems to me to have little bearing upon a question as to the custody of title deeds.]

Ambrose, in reply.

1884. April 3. The judgment of the Court (*Cotton*, *Bowen*, and *Fry*, L.JJ.) was now delivered by *Fry*, L.J., who after shortly stating the facts as to the securities in the same terms as above, proceeded as follows:—

The Plaintiffs being possessed of mortgages earlier in date than the mortgage of the Defendant, and, under these instruments, being the owners of the legal estate, are *primâ facie* entitled to priority over the Defendant, but the Defendant seeks to postpone the Plaintiffs' legal estate on various grounds.

The main contention on the part of the Defendant, which succeeded in the Court below, was that by reason of the negligent

(1) 2 De G. & J. 21.
(2) Law Rep. 10 Eq. 92.
(3) 21 Ch. D. 124.
(4) Law Rep. 10 Ex. 183.

conduct of the Plaintiffs, after they had taken their mortgages, these securities ought to be postponed to the security of the Defendant; and this point has been argued at such length and with so extensive a reference to the authorities, that it appears to us necessary to consider the matter fully.

The question which has thus to be investigated is—What conduct in relation to the title deeds on the part of a mortgagee who has the legal estate, is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate. It has been contended on the part of the Plaintiffs that nothing short of fraud will justify the Court in postponing the legal estate. It has been contended by the Defendant that gross negligence is enough.

The cases which assist in answering the question thus raised will be found to fall into two categories—(1), those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds; (2), those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them. The two classes of cases will not be found to differ in the principles by which they are to be governed, but they do differ much in the kind of fraud which is to be most naturally looked for.

In the case of a person taking the legal estate, and not seeking for or obtaining the title deeds from the mortgagor, the question may arise between the legal mortgagee and either a prior or a subsequent incumbrancer or purchaser. But in such a transaction the fraud about which the Courts are most solicitous is that which is practised when a man takes the legal estate with knowledge of a prior equitable sale or incumbrance, and yet strives to place himself in a position to show that he took without notice—that kind of fraud which Lord *Hardwicke* explained in *Le Neve* v. *Le Neve* (1), when he said:—"The taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser. . . .

(1) Amb. 436, 445.

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This is a species of fraud, and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate."

On the other hand, when the legal mortgagee has obtained the possession of the title deeds and subsequently gives them up, no question can arise between him and a prior equitable owner, and no suspicion of the particular fraud which we have referred to can arise; the estate of the legal mortgagee can never be improved by any subsequent dealings with the deeds, and therefore, before the Court can find a fraudulent intent in the legal mortgagee, it must be shewn that he concurred in some project to enable the mortgagor to defraud a subsequent mortgagee, or that he was a party or privy to some other fraud in fact. The kind of fraud most to be looked for in this class of cases is such as was described by the Lord Chancellor, Lord *Cowper*, in the case of the *Thatched House*, when he said (1):—"If a man makes a mortgage and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud will without doubt in equity postpone his own mortgage. So if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority."

On the head of law now under consideration the observations of Lord *Eldon* in giving judgment in the case of *Evans* v. *Bicknell* (2) are without doubt the leading authority. That case is remarkable for several reasons, and not the least so because it is the leading authority on a point which did not naturally arise in it. In that case a settlement had been made on the marriage of *Stansell* and his wife, the defendant *Bicknell* being the trustee of the settlement, and as such having possession of the title deeds. *Bicknell* had delivered the deeds to *Stansell*, and *Stansell* having obtained the deeds mortgaged the property to the plaintiffs and delivered to them the deeds. The plaintiffs alleged that *Bicknell* so delivered the deeds to assist *Stansell* in his fraud. *Bicknell*, on the contrary, alleged and swore that he did it to enable *Stansell*

(1) 1 Eq. Ca. Abr. 322. (2) 6 Ves. 174.

to obtain credit in his trade by shewing that his wife was tenant for life of the property; and the real question for decision was whether *Bicknell* could, on the ground of his alleged participation in *Stansell's* fraud, be made liable for the difference between the value of *Stansell's* life interest under the settlement and the amount of the plaintiff's mortgage. In considering this point the Lord Chancellor was led to discuss the question of postponing the legal estate on the ground of conduct. It is, we think, impossible to read the judgment and not to come to the conclusion that Lord *Eldon* considered that the same fraud and the same kind of negligence which would support a suit for personal relief would justify the postponement of the legal estate, and that nothing less would have that effect. Having referred to the evidence of the principal witness, Lord *Eldon* said (1): "I still entertain great doubt, whether upon such a transaction a party should be charged personally; for even upon that it amounts to no more than that a trustee delivers the deeds into the hands of a party, who has the settlement. I do not say, it is not negligence; but it is too dangerous upon such loose evidence to hold, that it is that gross negligence, that amounts to evidence of fraud."

The Lord Chancellor then turned to consider a judgment in which Mr. Justice *Buller* had erroneously affirmed that it was an established rule in equity that a second mortgagee who has the title deeds without notice should be preferred, and after adverting to his mistake observed (2): "The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence, that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee."

The expression "gross negligence that amounts to evidence of a fraudulent intention" is certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing not carelessly but for a purpose. But Lord *Eldon* seems to have meant by his words to describe the not doing of something, so

(1) 6 Ves. 189. (2) 6 Ves. 190.

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ordinarily done by honest men under the given circumstances, as to be really attributable not to negligence or carelessness, but to a fraudulent intention. In short, it appears to us that in the mouth of Lord *Eldon* the word "negligence" was used simply to express non-feasance.

In a subsequent passage of his judgment the Lord Chancellor varies the form of his language, but without throwing any fresh light on his meaning. In one place (1), he speaks of "negligence so gross as to amount to fraud," which seems like speaking of carelessness so great as to amount to design; in another place (2), of "negligence so gross as to amount to constructive fraud;" and again (3), of a "circumstance of so gross negligence . . . . that it is conclusive evidence of fraud."

In the subsequent case of *Martinez* v. *Cooper* (4), Lord *Eldon* referred to *Evans* v. *Bicknell* (5), as having settled the principle, which he again expresses in nearly similar language. "There must be," he says, "either direct fraud, or negligence amounting to evidence of fraud, to induce this Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed." All this language of Lord *Eldon*, though loose and difficult to construe, appears to us to point to fraud, as the necessary conclusion before the Court can deprive the owner of the legal estate of his legal rights derived from that estate. This fraud, no doubt, may be arrived at either by direct evidence or by evidence circumstantial and indirect, and it does not cease to be fraud, because the particular object in contemplation of the parties may have been a fraud in some respects different from the fraud actually accomplished; or because the person intended to have been defrauded may be different from the person actually defrauded; or because the original fraudulent intention had no particular person in view: See *Beckett* v. *Cordley* (6), and per Lord *Eldon* in *Evans* v. *Bicknell* (7).

That fraud and fraud alone was the ground for postponing the legal estate was, we think, the opinion of Lord *Hardwicke* in

(1) 6 Ves. 191.
(2) Ibid. 192.
(3) Ibid. 193.
(4) 2 Russ. 198, 217.
(5) 6 Ves. 174.
(6) 1 Bro. C. C. 353.
(7) 6 Ves. 192.

Le Neve v. *Le Neve* (1). "Fraud, or *mala fides*, therefore," he said, "is the true ground on which the Court is governed in the cases of notice."

That Sir *William Grant* entertained the same view, and considered it as the result of *Evans* v. *Bicknell* (2), is apparent from his observations in *Barnett* v. *Weston* (3), where he said that the old cases for postponing the first mortgagee had been shaken unless a case of fraud could be made out.

That Lord Justice *James* adopted the same rule is plain from what he said in the case of *Ratcliffe* v. *Barnard* (4). "The legal mortgagee must," he said, "have been guilty of fraud, or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud."

From this consensus of expression as to the true rule, some departure is said by the learned counsel for the Defendant to have occurred in the language used by Lord *Cranworth*, L.C., in the case of *Colyer* v. *Finch* (5), and of *Roberts* v. *Croft* (6). It is enough to say that in our opinion the Lord Chancellor plainly intended in both of these cases to lay down no new principle, and his use of the expression "negligence so gross as to be tantamount to a fraud," and his emphatic reliance on the cases of *Evans* v. *Bicknell* and *Martinez* v. *Cooper* (7) in his judgment in *Colyer* v. *Finch* are sufficient evidence of this intention.

Turning now to the decisions, mostly subsequent to that of *Evans* v. *Bicknell*, which have been cited in argument, it will be found that the cases which have arisen on the conduct of the mortgagee in not obtaining possession of the title deeds may be ranged in the following classes:—

(1.) Where the legal mortgagee or purchaser has made no inquiry for the title deeds and has been postponed, either to a prior equitable estate as in *Worthington* v. *Morgan* (8), or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke* v. *Palmer* (9). In these cases the Courts have considered the conduct of the mortgagee in making no

(1) Amb. 436, 447.
(2) 6 Ves. 174.
(3) 12 Ves. 130, 133.
(4) Law Rep. 6 Ch. 652.
(5) 5 H. L. C. 905.
(6) 2 De G. & J. 1.
(7) 2 Russ. 198.
(8) 16 Sim. 547.
(9) 21 Ch. D. 124.

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inquiry to be evidence of the fraudulent intent to escape notice of a prior equity, and in the latter case that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent.

(2.) Where the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett* v. *Weston* (1); *Hewitt* v. *Loosemore* (2); *Agra Bank* v. *Barry* (3).

(3.) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all and has accordingly not lost his priority, as in *Hunt* v. *Elmes* (4), *Ratcliffe* v. *Barnard* (5), and *Colyer* v. *Finch* (6).

(4.) Where the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purpose of his raising money on security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry-Herrick* v. *Attwood* (7). This case was decided not on the ground that the legal mortgagees had been guilty of fraud, but on the ground that as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist, as against those who in reliance on the deeds lent their money, that the mortgagor had exceeded his authority.

The cases where the mortgagee having received the deeds has subsequently parted with them, or suffered them to fall into the hands of the mortgagor, will be found to fall into the following classes:—

(1.) Where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities, as *Peter* v. *Russel*, or *Thatched House Case* (8); *Martinez* v. *Cooper* (9).

(1) 12 Ves. 130.
(2) 9 Hare, 449.
(3) Law Rep. 7 H. L. 135.
(4) 2 D. F. & J. 578.
(5) Law Rep. 6 Ch. 652.
(6) 5 H. L. C. 905.
(7) 2 De G. & J. 21.
(8) 1 Eq. Ca. Abr. 321.
(9) 2 Russ. 198.

(2.) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee: *Briggs* v. *Jones* (1). In such cases the Court has, on the ground of authority, postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry-Herrick* v. *Attwood* (2).

No case has been cited in which the legal mortgagee has (as by the Vice-Chancellor in this case) been postponed by reason of negligence in the custody of the deeds.

The decisions on negligence at common law have been pressed on us in the present case, but it appears to us enough to observe, that the action at law for negligence imports the existence of a duty on the part of the defendant to the plaintiff, and a loss suffered as a direct consequence of the breach of such duty; and that in the present case it is impossible to find any duty undertaken by the Plaintiff company to the Defendant, Mrs. *Whipp*. The case was argued as if the legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure; as if title deeds were in the eye of the law analogous to fierce dogs or destructive elements, where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having their possession or control. This view is in our opinion impliedly negatived by the whole course of decisions, and it is expressly repelled by the observations of the present Lord Chancellor in *Agra Bank* v. *Barry* (3), where he said, "It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry), which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted

(1) Law Rep. 10 Eq. 92. (2) 2 De G. & J. 21.
(3) Law Rep. 7 H. L. 157.

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for or explained. It may be evidence, if it is not explained, of a design, inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case." These observations appear to us conclusive on the point, and they at the same time suggest the conclusion, that if in any case it shall appear that a prior legal mortgagee has undertaken any duty as to the custody of the deeds towards any given person, and has neglected to perform that duty with due care, and has thereby injured the person to whom the duty was owed, there the legal estate might be postponed by reason of the negligence. But no such case appears as yet to have arisen, nor does it seem one likely often to occur. The point certainly does not arise in the present case, and we therefore give no opinion upon it.

The authorities which we have reviewed appear to us to justify the following conclusions:—

(1) That the Court will postpone the prior legal estate to a subsequent equitable estate: (*a*), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained; (*b*), where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

Now to apply the conclusions thus arrived at to the facts of the present case. That there was great carelessness in the manner in which the Plaintiff company through its directors dealt with their securities seems to us to admit of no doubt. But is that carelessness evidence of any fraud? We think that it is not. Of what fraud is it evidence? The Plaintiffs never combined

with *Crabtree* to induce the Defendant to lend her money. They never knew that she was lending it, and stood by. They can have had no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the Plaintiff company, and accordingly has no tendency to convict them of fraud.

Then comes the inquiry whether the Plaintiff company constituted *Crabtree* their agent to raise money, in which case the Defendant might be entitled to priority. The circumstance most favourable to this contention was, in our opinion, the possession by *Crabtree* of the key. But the Defendant has not proved the circumstances attending this fact, or the duties for the performance of which the key may have been essential, with sufficient distinctness to enable us to conclude from the possession of the key that it implied an authority to deal with the securities of the Plaintiff company. The cases in which *Crabtree* did so deal with the securities, when carefully considered, appear to us insufficient to support the authority claimed; and the fact that *Crabtree* in dealing with the Defendant suppressed his mortgage to the company and dealt with her, not as agent of the company having an authority to pledge its securities, but as the unencumbered owner of the property, goes, we think, far to negative the suggested authority. On this point, therefore, we agree with the Vice-Chancellor.

One other point was argued and demands decision. Of the £3500 paid by Mrs. *Whipp* to *Crabtree* it appears that £1900 found its way from *Crabtree* into the banking account of the Plaintiff company, but on the evidence we conclude that it was paid to the company on account of and as the money of *Crabtree*, and not of Mrs. *Whipp*, and further, that it was paid in part satisfaction of a much larger debt, and without notice to the company of the source from whence it was derived. It has been argued that to the extent of this £1900 the company should be postponed to Mrs. *Whipp*, on the ground that the Defendant is entitled to follow this money obtained from her by fraud. The proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a *bonâ fide*

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debt without notice is in our judgment devoid of support from principle or authority.

Differing as we do from the learned Vice-Chancellor on the one point on which he decided against the Plaintiffs, we conclude that his judgment must be discharged, and that instead of it the Court must declare the Plaintiffs entitled to priority and give the usual consequent relief. The Plaintiffs must add to their security so much of the costs of the action in the Court below as would have been incurred if the action had been a simple action for foreclosure and no question of priority had been raised, and the Defendant must pay to the Plaintiffs the residue of the Plaintiffs' costs in the Court below and the whole of the costs of the appeal.

Solicitors for Plaintiffs: *Parker & Stocks, Manchester.*
Solicitor for Defendant: *J. G. Openshaw, Bury.*

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In re LEES.

Lunacy—Property of Small Amount—Petition for Application of Income—Opposition by alleged Lunatic—Jurisdiction—Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *s.* 12 [*Revised Ed. Statutes, vol. xiv. p.* 188]—*General Orders in Lunacy, Nov.* 1862, *rr.* 7, 8—*Lunacy Orders*, 1883, *rr.* 61, 62.

The power given to the Lord Chancellor by s. 12 of the *Lunacy Regulation Act*, 1862 (extended by s. 3 of the *Lunacy Regulation Amendment Act*, 1882), to make an order for the application of the property of a person of unsound mind for his maintenance or benefit, when the property is below a specified amount, without directing any inquiry under a commission of lunacy, ought not, even if the jurisdiction extends to cases in which the alleged lunatic appears and denies unsoundness of mind, to be exercised in such cases.

THIS was a petition under the *Lunacy Regulation Acts*, 1862 and 1882.

The petition was presented by *Jane Lees* and *John Frederick Lees*, the wife and the eldest son of *John Lees*, and it alleged that *John Lees* was, and had since the year 1878 been, of unsound mind and incapable of managing his affairs. The petition stated

that the property of *John Lees* consisted of some leasehold cottages, held on lease for long terms of years, and let at weekly rents, and producing a net income of about £87 per annum, and some furniture worth about £60; that he had only three children, the petitioner, *J. F. Lees*, and two other sons who were infants, and that his wife and his three sons were the only persons who would be entitled to his estate under the *Statute of Distributions* in case he were dead intestate; and that, so far as the petitioners were aware, there was no sum owing to any person for past maintenance of *John Lees*.

The petition prayed that the taxed costs, charges, and expenses of the petitioners of the application and consequent thereon might be declared a charge on the leasehold cottages; that the petitioners might be authorized to receive the rents of the cottages during the life of *John Lees;* that £50 out of the net rents might be applied by the petitioners in the maintenance of *John Lees*; and that the residue of the net rents might be applied in the maintenance of the wife.

There was evidence that *John Lees* had been in confinement as a lunatic from June, 1878, to January, 1884, at first in the workhouse, subsequently in different county lunatic asylums, and ultimately, from the 6th of February, 1883, to the 4th of January, 1884 (when he escaped), in the *Parkside Asylum, Macclesfield*, as a private patient, and that before his confinement he had been under a delusion that his wife had been unfaithful to him, and had attempted to murder her. A medical man who had attended him in 1872 and in 1878 deposed that, in his judgment, he was at that time of unsound mind, and, when under the influence of his delusions, a dangerous lunatic. Another medical man, who was the medical superintendent of the asylum at *Macclesfield*, under whose care *John Lees* was while he was in that asylum, but who had not seen *John Lees* since the date of his escape, deposed that to the best of his judgment *John Lees* was suffering from deeply-seated and incurable insane delusions, and was of unsound mind and incapable of managing himself or his affairs, whenever such affairs were in any way connected with his delusions, and that he was not likely to recover from his delusions.

Since his escape *John Lees* had been living with his brother.

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John Lees opposed the petition, and he filed an affidavit in which he denied that he was of unsound mind. A medical man also made an affidavit in which he said that on the 14th of May, 1884, he had an interview with *John Lees*, and conversed with him fully with a view to ascertain his mental condition, and that the result of his examination was that in his opinion *John Lees* was quite able to manage his own affairs, and that his freedom from restraint was not attended with danger either to himself or to others.

There was also evidence on behalf of the petitioners that the brother of the alleged lunatic would not allow any medical man on behalf of the petitioners to have access to him.

Farwell, for the Petitioners:—

The Court has power to make the order which is asked for under sect. 12 of the *Lunacy Regulation Act* of 1862 (1), as now

(1) Sect. 12. "Where, by the report of one of the Masters in Lunacy or of the Commissioners in Lunacy, or by affidavit or otherwise, it is established to the satisfaction of the Lord Chancellor intrusted as aforesaid that any person is of unsound mind and incapable of managing his affairs, and that his property does not exceed £1000 in value, or that the income thereof does not exceed £50 per annum, the Lord Chancellor intrusted as aforesaid may, without directing any inquiry under a commission of lunacy, make such order as he may consider expedient for the purpose of rendering the property of such person, or the income thereof, available for his maintenance or benefit, or for carrying on his trade or business: Provided nevertheless, that the alleged insane person shall have such personal notice of the application for such order as aforesaid as the Lord Chancellor shall by general order to be made as after-mentioned direct."

Lunacy Orders, 1883, rule 61. "The petition and evidence shall be laid before one of the masters, who shall prepare the minutes of the order he thinks should be made thereon.

"The Judge may, upon consideration of the petition and the evidence in support thereof, and the minutes prepared by the master, either make an order thereon without any attendance of counsel, solicitors, or parties, or direct that the petition be set down for hearing, or may direct that the petition and affidavits be referred to the Masters for further inquiry, either generally, or as to any particular matter to which the petition relates."

Rule 62. "In the case of a general reference to the Masters under the last preceding order, they shall inquire as to the state of mind and condition of the alleged lunatic, and if they find that he is of unsound mind, and incapable of managing his affairs, they shall inquire as to the nature of his insanity, of what his fortune consists, and the amount of his income, and what should be allowed for maintenance, and out of what fund, and to whom the same should be paid. They

extended by sect. 3 of the *Lunacy Regulation Amendment Act*, 1882 (45 & 46 Vict. c. 82), to property of £2000 in value, or income not exceeding £100 per annum, and Rules 61, 62 of the Lunacy Orders, 1883.

[Baggallay, L.J.:—Does sect. 12 of the Act of 1862 apply to any but an unopposed case?

Cotton, L.J.:—I am not aware of any case in which, the application being opposed, the Court has made an order under sect. 12.]

Rules 7 and 8 of the General Orders in Lunacy of November, 1862, and the corresponding rules 61 and 62 of the Orders of 1882 appear to contemplate a general inquiry before the master as to the state of mind of the alleged lunatic.

[Cotton, L.J.:—In my opinion sect. 12 was not intended to apply to a case in which the alleged lunatic, having sufficient intelligence to do so, disputes the allegation of his insanity.

Baggallay, L.J.:—The rules speak only of the evidence "in support" of the petition; they say nothing about evidence in opposition to it.

Lindley, L.J.:—It seems to be assumed that there will be no contest; it was intended to provide a cheap mode of procedure in small cases.]

The Court has power under rule 62 to refer it to the master to ascertain whether the alleged lunatic is of unsound mind. This would be much cheaper than the ordinary inquisition. No injustice will be done to the alleged lunatic. Sect. 12 contemplates the production of evidence and the possibility of a contest.

[Lindley, L.J.:—There is no provision for a trial by a jury. It is a very serious thing to deprive a man of that right.]

The object was to save that expense in small cases. If an alleged lunatic has an absolute right to a jury, the jurisdiction

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may also inquire into any matter connected with the property, or the maintenance of the lunatic or of his family, and as to any other matter material to be considered in reference to the order to be made on the petition: and in making such inquiries the Masters may, if they think fit, visit the alleged insane person, or require him to be produced before them, as they may direct."

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under sect. 12 could always be ousted by his denying that he is a lunatic.

[COTTON, L.J.:—A simple denial without any evidence would not be sufficient. If in an ordinary case an alleged lunatic demands a jury, one of the medical visitors of the Court is always sent to see him, in order to ascertain whether he is of sufficient intelligence to make the demand. If he is, he is entitled to a jury as a matter of right. I do not like to say there is no jurisdiction under sect. 12, but, if there is, I think it ought not to be exercised in an opposed case, if the alleged lunatic is of sufficient intelligence to demand a jury. But I doubt whether in the present case you have sufficient evidence to justify an inquiry. You have no medical evidence of his present state.]

There is evidence that the respondent has twice attempted to murder his wife.

[COTTON, L.J.:—Do you desire to amend the petition by entitling it in the ordinary jurisdiction in lunacy?]

Yes; if the Court thinks it ought to be amended.

[*Leonard Field*, for the respondent. The petition should be dismissed.

COTTON, L.J.:—If the petition was dismissed, the petitioners might at once present an ordinary petition for an inquisition, and then, if the alleged lunatic declined to allow any medical man to see him, we should direct one of our visitors to examine him.]

One of the visitors might be directed to see him on the present petition.

COTTON, L.J.:—

I do not think it would be right to do that on the present petition. Our opinion is that sect. 12 of the Act of 1862 was only intended for the protection of property in uncontested cases. The petition should be amended as we have already suggested, and on this being done we shall direct that the Respondent be examined by medical men named on behalf of the Petitioners, and that a medical man on behalf of the Respondent be present at the interview. I think we ought not to dismiss the petition if

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the petitioners desire to amend it, and when it is amended it would be wrong not to put the matter in train for inquiry. We cannot give any directions, or order that access be allowed to the respondent until the petition has been amended. The Petitioners must undertake to amend the petition. When it has been amended, an order will be made that the Respondent's brother, or any person with whom the Respondent may be living, allow any medical man who is named on behalf of the Petitioners to have access to him, and another medical man will be present on behalf of the Respondent.

Field:—We shall be content if one of the visitors of the Court is present.

Cotton, L.J.:—When the petition has been amended, the matter may be mentioned to one of the Lords Justices in his private room.

Solicitors for Petitioners: *Chester, Mayhew & Co.*
Solicitors for Respondent: *Field, Roscoe, & Co.*

W. L. C.

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[1879. K. 65.]

Vendor's Lien for unpaid Purchase-money—Land in Register County—West Riding Registry Act (2 & 3 *Anne*, c. 4) [*Revised Ed. Statutes, vol. ii. p.* 116]—*Waiver of Lien—Sub-Purchaser—Notice.*

A vendor of land in a register county, part of whose purchase-money remains unpaid, is under no obligation to register a memorial of the vendor's lien, but is entitled to rely on his equitable lien against sub-purchasers who have notice of it actual or constructive.

A purchaser of land in a register county is bound to inquire for and examine the deeds and documents memorials of which are registered.

Land belonging to the trustees of a charity, situated in the West Riding of *Yorkshire*, was sold by the trustees to *R. & W.*, who were estate agents, and bought the land with the intention of selling it in lots for building purposes. Part of the purchase-money remained unpaid, and the vendors retained the deed of conveyance in their possession, but at the request of the purchasers, the vendors' solicitor registered a memorial of it in the

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West Riding registry. The vendors took no written security for their unpaid purchase-money, but relied on their equitable lien. *R. & W.* sold the land again in lots.

P. one of the sub-purchasers, who took a mortgage on a small lot, made no inquiries himself, but left it, as he said, to *R. & W.* to "manage the business" for him, and they prepared the conveyance to him.

The original vendors having brought an action to enforce their lien for the unpaid purchase-money against some of the sub-purchasers :—

Held, that there was no obligation on the original vendors to register a memorial of the vendor's lien.

Whether the neglect of the sub-purchasers to search the register and inquire for the deed affected them with constructive notice of the Plaintiffs' lien, *quære*.

But the Court being convinced on the evidence that the vendors knew that *R. & W.* wanted the deed of conveyance registered for the purpose of selling, and that they did sell, the land in lots, and that by their conduct in registering the deed they had led the sub-purchasers to believe that *R. & W.* had power to dispose of the land as absolute owners :—

Held, that the vendors had waived their lien and could not enforce it against the sub-purchasers.

Semble, the fact of *P.* having left *R. & W.* to manage the business for him was not in itself sufficient to affect him with their knowledge of the lien.

THIS was an appeal by *J. Padgett* and the devisees of *J. Roberts*, some of the Defendants to the above-mentioned action, against the judgment of Mr. Justice *Fry* (1).

The facts, so far as they relate to the case of the Appellants, were shortly as follows :—

The Plaintiffs were the trustees of a charity at *Leeds* known as *Jenkinson's Hospital*, and were seised of certain land in that character. On the 21st of June, 1872, they entered into an agreement (subject to the approval of the Charity Commissioners, which was afterwards given) to sell the land, which contained about four acres, to *B. H. Richardson* and *J. H. Watson* in fee for £2523, and a deposit of £223 was then paid to the Plaintiffs.

On the 15th of November, 1872, a deed was executed by which the trustees conveyed the land as to one moiety to *Richardson* in fee, and as to the other moiety to *Watson* in fee. There was indorsed on the deed a receipt for £2523 as having been paid by *Richardson & Watson* to the trustees. In fact, however, nothing was paid to the Plaintiffs except the deposit of £223. After the

(1) 21 Ch. D. 685.

execution of the deed it was retained by Mr. *Dibb*, the Plaintiffs' solicitor, as a protection to the Plaintiffs' lien for the unpaid balance of the purchase-money. On the 1st of January, 1873, *Richardson & Watson* paid a further sum of £800 on account of the purchase-money. The remaining £1500 was never paid by *Richardson & Watson*, but they continued to pay the Plaintiffs interest on it.

On the 10th of January, 1873, Mr. *Dibb*, at the request of *Richardson & Watson*, registered a memorial of the purchase-deed in the West Riding Registry at *Sheffield*. The circumstances under which this was done are specially referred to in the judgment of the Court of Appeal. It is sufficient to state that the evidence convinced the Court that Mr. *Dibb* knew that *Richardson & Watson*, who were land and estate agents at *Leeds*, wanted the deed registered, not only to protect themselves but in order that they might sell it in lots to purchasers; and that Mr. *Dibb* relied on his possession of the deed and his consequent power to interfere at any time and require the purchase-money to be paid to him as sufficient protection for the trustees.

Richardson & Watson sold various portions to different purchasers, some of whom the Plaintiffs made Defendants to the action, alleging that they had notice actual or constructive of the Plaintiffs' lien.

By a deed dated the 1st of January, 1874, *Richardson & Watson* granted 825 square yards of the land to *A. F. Holroyd* in fee, and by another deed dated the same day they granted other 821 square yards of the land to *Holroyd* in fee. He was a clerk in the office of *Richardson & Watson*, but it was not proved that he had any notice of the Plaintiffs' lien. He, in fact, gave no consideration for the conveyances to him, though each of the deeds purported to be made in consideration of £200 paid by him.

By two deeds, dated respectively the 27th of February, and the 30th of March, 1874, *Holroyd* granted the 825 and the 821 square yards to the Defendant *J. Padgett* in fee by way of mortgage. *Padgett* had no actual notice of the Plaintiffs' lien. In his answer to interrogatories administered to him by the Plaintiffs, he said that he did not employ any solicitor to act for him on the respective occasions of these mortgages, but that he left it to

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Richardson & Watson to manage the business, though he did not give them any authority to employ a solicitor on his behalf.

By a deed dated the 12th of February, 1874, *Richardson & Watson* granted 765 other square yards of the land to *Holroyd* in fee. It was not proved that when he took this conveyance he had any notice of the Plaintiffs' lien, but he gave no consideration for the conveyance, though it purported to be made for value. By a deed dated the 13th of February, 1874, *Holroyd* granted the 765 square yards to *W. Eastwood* in fee by way of mortgage. By a deed dated the 2nd of September, 1874, *Holroyd* granted the same 765 square yards to *Joseph Roberts* in fee, subject to the mortgage to *W. Eastwood*. *Roberts* died in May, 1878, having by his will devised all his real estates to the Defendants, *James Roberts*, *H. Wylde*, and *W. Richardson* in fee, and appointed them his executors.

Mr. Justice *Fry* held that *James Padgett* had employed *Richardson & Watson* as his general agents to manage the business of his mortgages from *Holroyd*, who was himself a volunteer, and that it was their duty to communicate to him their knowledge of the Plaintiffs' lien, and consequently that *Padgett* must be affected with notice of the lien.

His Lordship also held that *Joseph Roberts*, who had only purchased an equitable interest from *Holroyd*, had no equity which could be preferred to that of the Plaintiffs.

The result was that as to the Defendants *J. Padgett* and the devisees of *J. Roberts* the Plaintiffs obtained judgment; and from this judgment the Defendants appealed.

Whitehorne, Q.C., and *Bunting*, for the Appellants, the devisees of *J. Roberts*:—

The vendor's lien is such a charge on the land as may be registered under the 2 & 3 Anne, c. 4, and as it was not registered in this case, the vendors have lost it. It does not arise till the conveyance is executed, and is in the nature of an equitable mortgage for the purchase-money remaining due. Some memorandum of it might have been made and placed on the register. The omission to do so was a fraud upon subsequent purchasers. It is true that if the purchasers had called for the conveyance they

could have discovered that the Plaintiffs still had it; but it was not incumbent on them to do so; they were entitled to trust to the register as shewing all the incumbrances: *Moore* v. *Culverhouse* (1); *In re Wight's Mortgage Trust* (2); *Neve* v. *Pennell* (3); *Credland* v. *Potter* (4); *Agra Bank* v. *Barry* (5); *Chadwick* v. *Turner* (6). But in the special circumstances of the present case the Plaintiffs have precluded themselves from insisting on their lien. It was the intention of all parties that the land should be sold in lots, which is inconsistent with their claim of lien. They knew that it was so sold, and yet did not give notice to the purchasers, but permitted the purchase-money to be paid to *Richardson & Watson*: *Earl of Jersey* v. *Briton Ferry Floating Dock Company* (7); *Smith* v. *Evans* (8). By registering the deed at the request of *Richardson & Watson* they led the public to suppose that the purchase was entirely completed and that the purchaser had perfect right to deal with it. We have, therefore, a better equity than the Plaintiffs: *Rice* v. *Rice* (9); *Phillips* v. *Phillips* (10).

Barber, Q.C., and *Bardswell*, for the Appellant *Padgett*:—

We adopt the same arguments as have been urged on behalf of the other Appellants. We further contend that there is no ground for holding that *Padgett* is affected with notice, because he left the management of the transaction to *Richardson & Turner*. He gave value for the property and has the legal estate, and has been guilty of no negligence. He did not really purchase from *Holroyd* but from *Richardson & Watson*. It was their interest to conceal incumbrances from him, therefore he cannot be affected with their notice. The fact that he left them to carry the matter through does not make them his agents: *Espin* v. *Pemberton* (11); *Perry* v. *Holl* (12); *Hipkins* v. *Amery* (13). The title shewn on the register is conclusive unless actual notice can be shewn: *Hine* v. *Dodd* (14); *Wyatt* v. *Barwell* (15); *Chadwick* v. *Turner*.

(1) 27 Beav. 639.
(2) Law Rep. 16 Eq. 41.
(3) 2 H. & M. 170.
(4) Law Rep. 10 Ch. 8.
(5) Ibid. 7 H. L. 135.
(6) Ibid. 1 Ch. 310.
(7) Law Rep. 7 Eq. 409.
(8) 28 Beav. 59.
(9) 2 Drew. 73.
(10) 4 D. F. & J. 208.
(11) 4 Drew. 333; S.C. 3 De G. & J. 547.
(12) 2 D. F. & J. 38.
(13) 2 Giff. 292.
(14) 2 Atk. 275.
(15) 19 Ves. 435.

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Cookson, Q.C., and *Langworthy*, for the Plaintiffs:—

[BAGGALLAY, L.J.:—We need not trouble you as to the construction of the *Registry Act*.]

Assuming then that it was not necessary to register the vendor's lien, there is nothing in our conduct which has waived or lost our lien. With respect to *Roberts*, no ground has been shewn for placing his equity above ours. He took no precautions, and we did. He made no inquiry or investigation of title. If he had inquired he would have found that we had retained the deed and would have thus got notice of our lien. There is nothing unusual or delusive in our permitting the conveyance to *Richardson & Watson* to be registered. It was merely completing the legal title of the purchaser, to which the purchaser was entitled as he had paid part of the purchase-money. It would have been wrong to delay it, because the witnesses to the execution have to attend. A vendor's lien cannot be waived unless there is an intention to waive it, and if it was waived as to some lots, it was not waived as to the rest of the property: *Mackreth* v. *Symmons* (1); *Peto* v. *Hammond* (2); *Crosse* v. *General Reversionary and Investment Company* (3). It is not a new charge, but part of the old estate, which the vendor has never lost. If *Roberts* had no notice, that is no reason why his equity should prevail. The Court will determine which party has the preferable equity: *Mumford* v. *Stohwasser* (4); *Phillips* v. *Phillips* (5); *Cave* v. *Cave* (6); *Stackhouse* v. *Countess of Jersey* (7); *Worthington* v. *Morgan* (8). *Padgett* was equally negligent; and, besides, he had notice through *Richardson & Watson*, whom he employed as his agents. It is not a case of constructive notice; their actual notice is to be imputed to him: *Brotherton* v. *Hatt* (9); *Rolland* v. *Hart* (10); *Bradley* v. *Riches* (11); *Wyllie* v. *Pollen* (12); *Atterbury* v. *Wallis* (13).

Whitehorne, in reply, on behalf of *Roberts'* devisees.

Barber, in reply, on behalf of *Padgett*.

(1) 15 Ves. 329.
(2) 30 Beav. 495.
(3) 3 D. M. & G. 698, 712.
(4) Law Rep. 18 Eq. 556.
(5) 4 D. F. & J. 208.
(6) 15 Ch. D. 639.
(7) 1 J. & H. 721.
(8) 16 Sim. 547.
(9) 2 Vern. 574.
(10) Law Rep. 6 Ch. 678.
(11) 9 Ch. D. 189.
(12) 3 D. J. & S. 596.
(13) 8 D. M. & G. 454.

1884. May 28. LINDLEY, L.J., delivered the judgment of the Court (*Baggallay*, *Cotton* and *Lindley*, L.JJ.), as follows:—

The facts in this case have been already reported (1), and except so far as they relate to *Dibb's* conduct, to which allusion will be made, it is unnecessary to add to the statement of them in that report.

The *primâ facie* right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase-money is too well established to be disputed. The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase-money is not duly paid. There is no necessity for the vendor to stipulate for the lien; and although the lien arises from, and may in one sense be said to be created by, the contract of sale, still no contract to confer the lien is necessary, and in that sense the lien may be said to arise independently of contract. No contract to confer the lien being necessary, it follows that where it is not in fact conferred by a written document there is no instrument creating it a memorial of which can be registered under the provisions of the Statute of *Anne* (2 & 3 Anne, c. 4). The vendor's lien is in this respect like a deposit of deeds as a security for a loan without any memorandum or document shewing the purpose of the deposit. *Sumpter* v. *Cooper* (2) decided that the statute does not apply to a security so created, and no other decision would be in accordance with the language of the Act. Such cases are not provided for by the statute, and it is not competent for this, or indeed any Court to hold a transaction to be within the provisions of a statute when its language clearly does not apply to the transaction in question. We are unable, therefore, to accede to the contention that in this case the vendor's lien must be negatived simply on the ground that no memorial of it was registered. The answer to that contention is, there was no document of which a memorial could be made. *Agra Bank* v. *Barry* (3) is a valuable authority to shew that a purchaser of land in a register county is not bound to inquire about deeds and documents memorials of which have not been registered, and of which he has no notice. But that case has really no bearing on the

(1) 21 Ch. D. 685. (2) 2 B. & Ad. 223. (3) Law Rep. 7 H. L. 135.

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present, and the reasoning of the noble Lords who decided it has no application to transactions memorials of which are not required to be made or registered.

Neither can we accede to the contention that in register counties it is not necessary for a purchaser to inquire for or examine deeds memorials of which are registered. The registered memorials themselves give very little information, and the object of the statute seems rather to be to let people know what they are to inquire about than to dispense with inquiry respecting deeds and documents memorials of which are registered. On the one hand the register invites a purchaser's attention to the documents on it, and on the other it limits his inquiry to these documents, unless he has notice of others from some other quarter. The common practice, moreover, certainly is in accordance with this view, and *primâ facie* a purchaser of lands in a register county omits ordinary precautions if he makes no inquiry respecting the documents the existence of which is disclosed by the register. The conveyance of the 15th of November, 1872, from the Plaintiffs to *Richardson & Watson* was properly entered on the register, but neither of the Appellants searched the register or made any inquiry whatever for that deed. *Primâ facie*, therefore, both of the Appellants omitted to take reasonable precautions; and although they were undoubtedly *bonâ fide* purchasers for value without notice of the Plaintiffs' lien, it was strenuously contended that not having chosen to make any inquiry for that deed, they ought to be treated as having had notice of its retention by the Plaintiffs, and of their lien which they preserved by retaining it. Lord Justice *Fry* did not decide against the Appellants on this ground, and for the reasons which will be given presently it is not necessary to consider whether he might have done so or not. He decided *Roberts's* case on the ground that his estate was equitable only, and this would have been a sufficient ground if there were not other circumstances in the case affecting the rights of the Plaintiffs. The Lord Justice decided against *Padgett* on the ground that he had in effect made *Richardson & Watson* his agents to do more than prepare his mortgage and register it, and that he had through them notice of the Plaintiffs' lien. We feel considerable difficulty in adopting

the view taken by the Lord Justice of the extent to which *Padgett* made *Richardson & Watson* his agents, and of the notice which he had through them of the Plaintiffs' lien. But for the reasons which will be stated presently, it is not necessary to say any more upon this point.

Assuming all the foregoing points to be decided adversely to the Appellants, there are circumstances in this case which entitle the Appellants to succeed in their contest with the Plaintiffs. These circumstances we now proceed to state. The Plaintiffs were trustees for a charity, and *Dibb* was their law clerk and agent. They allowed £1500, part of the purchase-money, to remain unpaid. They, nevertheless, expressly sanctioned the registration of the conveyance from themselves to *Richardson & Watson*. The Plaintiffs left the further completion of the sale entirely to *Dibb*, and they even authorized him to receive the unpaid purchase-money. He retained the conveyance for them as a security for it, and Mr. *Denison*, the acting trustee, knew this. *Dibb* is unfortunately dead. But, considering the Plaintiffs' answers to interrogatories, the proved existence of the sale plan early in 1873, the dates of many of the sub-sales, the descriptions of the parcels in them, *Dibb's* answers to letters written to him by solicitors acting for sub-purchasers and mortgagees, and the dates of these letters, we cannot avoid the conclusion that *Dibb* knew perfectly well that *Richardson & Watson* wanted their deed registered, not only to protect themselves, but in order that they might sell the property, and that they intended to sell it, and did sell it in lots, and that he knew that they were selling lot after lot to persons who made no inquiry for the registered deed which he held, and who bought upon the faith that *Richardson & Watson* were the owners of the property sold and able to sell free from any charge or lien. *Dibb* did not die until 1875, and all the land was not sold even then. The last lot was not sold until September, 1877, nearly two years after his death. By retaining the deed as he did, *Dibb* could at any time have interfered and required the sub-purchasers to pay their money to him if he had thought it necessary or ex-expedient to do so; and Mr. *Denison's* evidence shews that *Dibb* relied on this power as a sufficient protection to the Plaintiffs, his clients. Mr. *Denison's* evidence also shews that he knew this,

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and that he and his co-trustees relied on *Dibb's* vigilance to protect their interests. In our opinion the conduct of *Dibb* induced purchasers of the portions of the estate sold reasonably to believe that *Richardson & Watson* had power to deal with the estate as absolute owners free from the lien now insisted on; and as he so acted the Plaintiffs, who left everything to him, cannot, in our opinion, assert their lien against lots purchased without notice that the trustees desired to insist on their lien even though such purchasers have an equitable title only. Lord Justice *Fry* appears to us to have attached too little weight to *Dibb's* knowledge and conduct, and differing from him on this point, we are of opinion that the Plaintiffs are not entitled to enforce their lien against the Appellants, or either of them, and that the action ought to be dismissed against them, with costs both here and below.

Solicitors for the Plaintiffs: *Paterson, Snow, & Co.*, agents for *Dibb, Atkinson, & Braithwaite, Leeds.*

Solicitors for Defendants: *Hickin & Graham*, agents for *Lodge & Rhodes, Leeds; Jaques, Layton & Jaques*, agents for *Scholefield & Son, Dewsbury.*

M. W.

C. A. 1884 March 27, 28, 29; May 29.

Ex parte BARTER. *Ex parte* BLACK. *In re* WALKER.

Fraud on Bankrupt Law—Shipbuilding Contract—Power for Buyer in the Event of Bankruptcy of Builder to use Materials belonging to Builder in completion of Ship.

A contract for the building of a ship provided that, if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without the same having been completed and ready for delivery, or in the event of the bankruptcy or insolvency of the builder, it should be lawful then and thenceforth for the buyer to cause the ship to be completed by any person he might see fit to employ, or to contract with some other person for the completion of the work agreed to be done by the builder, and to employ such materials belonging to the builder as should be then on his premises, and which should either have been intended to be, or be considered fit and applicable for the purpose:—

Held, that, so far as this clause applied to the bankruptcy of the builder,

it was void as against the trustee in his bankruptcy as being an attempt to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy, and as depriving the trustee of the right to elect whether he would complete the ship or not as might seem most advantageous for the creditors under the bankruptcy, and transferring that right of election to the buyer :

Held also, that, this clause having been put in force by the buyer on the filing of a liquidation petition by the builder, the user of the builder's goods in the completion of the ship could not be justified on the ground of a subsequent cesser of work on the ship.

IN this case there were two appeals from an order made on the 10th of July, 1883, by Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

The material facts were as follows: On the 13th of September, 1882, a written contract was entered into between *Walker & Co.*, who were shipbuilders, of the one part, and a Portuguese steamship company, of the other part, in which the former parties were described as the builders and the latter as the buyers. By this contract the builders agreed to build and sell to the buyers an iron screw steamship, according to certain signed specifications, to be built and delivered by the 1st of May, 1883. The price was to be £12,000, payable in instalments, viz., £1000 on keel being laid, £1500 when framed, £2000 when plated, £2000 when launched, £1500 when machinery aboard, £4000 on delivery. It was provided that, from and after the payment of the first instalment, the steamship and engines, and all belonging to her or them, or so much thereof as should be then built, or bought, or ordered for her or them, should be and remain the absolute property of the buyers, subject only to the lien of the builders for any unpaid purchase-money. [This clause of the agreement was referred to in the judgment of the Court as the "vesting clause."] The agreement contained also the following stipulations: "That if at any time the said builders shall cease working on the said steamship for the space of fourteen days, or shall allow the time for the completion and delivery of the said steamship to expire for the space of one calendar month without the same having been completed and ready for delivery, or in the event of the bankruptcy or insolvency of the said builders, it shall be lawful then and thenceforth for the said buyers to cause

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any person or persons nominated for that purpose by them to enter upon and take possession of the said vessel, and of all materials, matters, or things prepared or provided, or in the course of preparation for the said steamship, and to cause the said steamship to be completed by any person or persons whom the said buyers may see fit to employ in such completion, or in like manner to contract with some other person or persons for the completion of the work agreed to be done by the said builders, either for an agreed sum or otherwise, and to employ such materials of and belonging to the said builders as shall be then on their premises, and which shall either have been intended to be, or be considered fit and applicable for the purpose; and for this purpose to use the said yard and premises, and all fixed or moveable engines, plant, and tools of the said builders, and for this purpose these presents shall be construed, and operate, and enure by way of leave and license as well as by way of contract. And it shall be lawful for the said buyers to pay such person or persons so to be employed by them as aforesaid, such sum or sums as they may think fit or agree upon in that behalf. And it shall be lawful for the said buyers to deduct such sum or sums as they may so pay from and out of the payments agreed by them to be paid to the said builders. And it is hereby further agreed that, in the event of the amount of such payments, together with the payments made to the said builders, exceeding in the aggregate the amount of the contract price agreed to be paid to the said builders, the said builders shall on demand pay such excess to the said buyers, together with interest, at the rate of 5 per cent. per annum, from the date of finishing the said vessel." [In the judgment of the Court the power to take possession was referred to as the "seizure clause," and the power to employ materials as the "user clause."]

In November, 1882, the first instalment was paid, and thereupon the "vesting clause" took effect.

On the 7th of February, 1883, *Walker & Co.* filed a liquidation petition, and thereby committed an act of bankruptcy.

On the 9th of February Messrs. *Barter & Co.*, who were acting as the agents in *England* of the Portuguese company, authorized a Mr. *Smith*, in the terms of the "seizure clause," to enter upon

and take possession of the steamship, and of all materials, matters, and things prepared, or provided, or in course of preparation for her.

On the same day *Smith* acted upon the authority thus conferred upon him, and took formal possession of the ship and of certain materials.

A receiver was appointed under the liquidation petition, and he went on with the building of the ship, *Smith* offering no obstacle to the use of the materials of which he had taken possession for the purposes of the ship. This continued till the 28th of February, when the receiver paid off all the men in the yard, and ceased working.

Nothing was done on the ship from the 28th of February to the 6th or 7th of March following.

On the receiver's cesser of work, *Barter & Co.*, acting as agents for the Portuguese company, entered into negotiations with Messrs. *Black & Drury*, and by a letter of the 5th of March *Black & Drury* offered to complete the ship on certain terms, one of which was as follows:—

"We to have the benefit of your rights under your agreement with Messrs. *Walker & Co.* to all materials, matters, or things prepared or provided, or in the course of preparation for the said steamship, and to the employment of such materials of and belonging to Messrs. *Walker & Co.*, or their estate, as are on their premises, and which shall either have been intended to be, or be considered fit and applicable for the purpose of completing the said vessel, and for the purpose of so completing to use the yard and premises, and all fixed and moveable engines, plant, and tools of the said Messrs. *Walker & Co.* or their estate."

On the 6th of March *Barter & Co.* accepted *Black & Drury's* proposal, and immediately thereafter *Black & Drury* commenced working on the ship, and received from *Smith* possession of the goods which had been seized, and they used in the building of the ship certain materials which were in the yard.

On the 14th of March *Walker & Co.* were adjudicated bankrupts, and on the 10th of July, 1883, on the application of the trustee in the bankruptcy, the order appealed from was made.

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By this order the Court declared that all the materials belonging to the steamship or engines, or which were bought or ordered for her or them, were the property of the purchasers as against the trustee.

The order further directed an inquiry to ascertain what of the materials or stock (other than the materials belonging to the steamship or engines or which were bought or ordered for her or them) which on the 7th of February, 1883, were in or about the dockyards, had been used or disposed of by *Barter & Co.* and *Black & Drury*, or either of them, in or about the construction of the steamship or otherwise since the 7th of February, 1883, and also the value of such materials and stock so used or disposed of, and *Barter & Co.* and *Black & Drury*, or some or one of them, were ordered to pay to the trustee the value of the materials and stock (other than as aforesaid) so used or disposed of, and also to deliver up to the trustee all materials, stock, and tools which then remained in the said dockyards unworked or undisposed of (other than those mentioned in the "vesting clause" of the agreement).

From this order *Barter & Co.* and *Black & Drury* presented separate appeals.

Cooper Willis, Q.C., and *Creed*, for *Barter & Co*:—

We have personally done nothing wrong, and we ought not to be made responsible for what *Black & Drury* did. *Smith* did not seize anything but that which had already vested in the buyers under the "vesting" clause of the contract.

But if we are liable for what *Black & Drury* did, the "user" clause of the agreement is in no way a fraud on the policy of the bankrupt law. The use of the builders' materials in completing the ship would diminish the amount of the buyers' proof in the bankruptcy. The clause is in effect a provision that, in case the trustee does not complete the ship himself, the materials are to be used for the benefit of the estate of the bankrupts. It is not like a case in which materials are to be forfeited to a buyer on the bankruptcy of a builder. The case is distinguishable from *Ex parte Jay* (1). *Brown* v. *Bateman* (2) and *Ex parte Dickin* (3)

(1) 14 Ch. D. 19. (2) Law Rep. 2 C. P. 272. (3) 4 Ch. D. 524.

were decided on the ground that the property in the materials passed on the signing of the contract to the buyer. We cannot contend that that is so in the present case.

J. E. Linklater, for *Black & Drury* :—

The question is, whether the object of the "user" clause was to give the buyers an additional security in the event of the bankruptcy of the builders, and whether it was intended to be acted on only in the event of bankruptcy: *Ex parte Voisey* (1); *In re Stockton Iron Furnace Company* (2). It is essential to its invalidity that this should have been the intention. The clause is directed to other events than bankruptcy. Moreover, the stipulation is, not that the materials shall become the absolute property of the buyers, but that they shall be used in the completion of the ship. This might relieve the bankrupt's estate from a claim for large damages, for the price of materials might have risen largely.

[FRY, L.J.:—The clause only says that it shall be lawful for the buyers to use the materials. I think they would have an election to use the materials or to prove against the bankrupts' estate for damages.]

The question is whether at the time when the contract was entered into the parties intended to defeat the bankrupt law;—whether it was an honest or a dishonest contract. *Ex parte Jay* (3) is distinguishable.

[BOWEN, L.J., referred to *Reeves* v. *Barlow* (4).]

The decision there followed that in *Ex parte Newitt* (5).

We took possession of the materials, not on the bankruptcy, but because the receiver, who had carried on the work on the ship, stopped working altogether. Seizure after an act of bankruptcy on the happening of one of the other events mentioned in the agreement was valid: *Ex parte Newitt*. It would not have been necessary to wait until the expiration of the fourteen days, if the builder had said, I don't intend to go on with the work.

(1) 21 Ch. D. 442.
(2) 10 Ch. D. 335.
(3) 14 Ch. D. 19.
(4) 11 Q. B. D. 610.
(5) 16 Ch. D. 522.

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[COTTON, L.J.:—How could the receiver give up any of the rights of the creditors?

FRY, L.J.:—What power had he to shorten the fourteen days?]

We did nothing until after the receiver had actually dismissed the workmen, and had refused to pay them any more wages.

Winslow, Q.C., and *Herbert Reed*, for the trustee:—

If a power to seize in the event of bankruptcy is made valid because other events are coupled with bankruptcy, the rule laid down in *Higinbotham* v. *Holme* (1) would be easily evaded. It would only be necessary to couple some very trivial event with bankruptcy. The trustee's title relates back to the act of bankruptcy. The creditors would be injured by the seizure of the materials; to the extent of their value the buyers would receive payment of their claim for damages in full. The reduction in the amount of the proof would not, therefore, be of any benefit to the estate. The stipulation would be beneficial to the buyers only in the event of its not being advantageous to the estate for the trustee to finish the ship; if it would be advantageous to the estate the trustee would of course finish her. The clause would, therefore, be brought into operation only when it would be disadvantageous to the estate. On the facts in *Ex parte Newitt* (2), *Higinbotham* v. *Holme* did not apply. The whole of the agreement must be looked at. The entry cannot be justified by the subsequent cesser of working by the receiver: *Ex parte Jay* (3). What was done amounted to a conversion of the trustee's goods: *Baldwin* v. *Cole* (4); *M'Combie* v. *Davies* (5); *Burroughes* v. *Bayne* (6).

The Appellants prevented the trustee from going on with the work. There is a mere license to seize the materials, and no property passed until seizure; the license could not bind the trustee in the bankruptcy: *Howes* v. *Ball* (7); *Tripp* v. *Armitage* (8); *Ex parte Nichols* (9); *Holroyd* v. *Marshall* (10).

(1) 19 Ves. 88.
(2) 16 Ch. D. 522.
(3) 14 Ch. D. 19.
(4) 6 Mod. 212.
(5) 6 East, 538.
(6) 5 H. & N. 296.
(7) 7 B. & C. 481.
(8) 4 M. & W. 687, 699.
(9) 22 Ch. D. 782.
(10) 10 H. L. C. 191.

Cooper Willis, in reply for both Appellants:—

Smith took possession with the permission of the receiver, and the use of the materials was with the assent of the receiver. There was certainly no conversion of the trustee's goods by *Barter & Co.* The main question is whether there is anything in the agreement in fraud of the bankrupt law. If the words "in the event of bankruptcy or insolvency" had not been in the clause in question, there could not have been any objection to it; what difference does the insertion of those words make? The true interpretation is "in the event of bankruptcy or insolvency preventing the completion of the ship," and this is the interpretation which the parties put on them, for they did not attempt to go on with the work until the receiver declined to do so. The agreement was not entered into with a view to committing a fraud on the bankrupt law; it was a *bonâ fide* agreement, not a mere sham: *Ex parte Williams* (1); *Ex parte Mackay* (2).

May 29. FRY, L.J., read the written judgment of himself and *Cotton* and *Bowen* L.JJ., which, after stating the facts as above, continued:—

We observe that the series of powers just read, which may be called the "seizure" and "user" clauses, are all to arise on the happening of any one of four separate events—cesser of work, delay in delivery, bankruptcy or insolvency of the builders, and further, that the words descriptive of the materials are different in the "vesting," "seizure," and "user" clauses of the agreement.

The inquiries and the consequent directions for payment contained in the Registrar's order in effect charge both *Barter & Co.* and Messrs. *Black & Drury* with the value of all the materials which had not passed to the Portuguese company under the contract, and which were used in the completion of the vessel after the date of the liquidation petition.

It appears to us to be plain that the learned Registrar has carried back the inquiry to too early a date, and that there is no pretence for charging any of the Appellants with the value of the

(1) 7 Ch. D. 138. (2) Law Rep. 8 Ch. 643.

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materials employed before *Smith* took possession, or after *Smith* took possession and whilst the receiver continued the works on the ship: in short, if any inquiry is to be directed, it must begin on the 7th of March, and not on the 7th of February.

The next question is whether *Barter & Co.* are liable for the conversion of the goods. They could not, in our opinion, be held liable simply because they, as agents of the Portuguese company, subrogated *Black & Drury* to all the rights of the Portuguese company in respect of the materials: nor can they be held liable for the seizure of any goods, if the goods of which they authorized the seizure by *Smith* were only goods which were vested in the company by the contract.

This gives rise to the inquiry whether the words used in the "vesting" and "seizure" clauses of the contract have the same force, or whether the latter are larger than the former.

The words of the vesting clause are "all belonging to her or them" (*i.e.*, the vessel or engines) "or so much thereof as shall be then built, or bought or ordered for her or them." In form the words express an alternative, and, if their true force be alternative, they would seem to give the grantees or buyers an election to take either all belonging to the ship and engines, or a part of such all. But we think that a construction giving a choice between the whole or a part is an unreasonable one, and that the latter words are designed to give distinctness to a portion of the things included under the word "all," so that the "vesting" clause operates to convey the property in the ship and engines and in everything built or bought or ordered for the ship or engines and all other things (if any) belonging to the ship or engines.

Now, turning to the words of the "seizure" clause, we find that they include everything (1) prepared for the ship, (2) provided for the ship, and (3) in course of preparation for the ship. Many of these things would, no doubt, come under the description of things bought or ordered for the ship, but all of them would, in our opinion, be things belonging to the ship within the meaning of the contract. The words, therefore, of the "seizure" clause appear to us either equivalent to those of the vesting clause, or somewhat less extensive. It follows that, in our opinion, the

authority given to *Smith*, which followed the words of the "seizure" clause, authorized him only to take possession of property already belonging to the Portuguese company.

Did *Smith* in fact seize property other than that belonging to the company? Our conclusion from the evidence is that *Smith* did not in fact take possession of any property beyond that which was already vested in the Portuguese company, and consequently that the inquiry and direction for payment cannot be maintained as against *Barter & Co.*

Then arises the question whether the inquiry and direction can be sustained as against *Black & Drury*; and here, again, the first inquiry is one of fact, Did *Black & Drury* use in the completion of the ship any materials which at the date of the bankruptcy were the property of the builders and not of the company?

We think there is enough evidence to make the inquiry reasonable, if it be right in point of law. If the inquiry of fact shall be answered by finding that *Black & Drury* did use in the construction of the vessel some of the property which, after the date of the bankruptcy, was vested in the builders, and not in the buyers—there remains the legal question whether *Black & Drury* can be held liable for its value, or whether they can justify its appropriation under the "user" clause of the agreement, which, unlike the "vesting and seizure" clauses, deals with the property of the builders, not that which had become the property of the buyers? The bankruptcy of *Walker & Co.* was the event on which in fact *Barter & Co.* put in force the series of powers vested in the buyers by the agreement, and on which, therefore, *Black & Drury* must *primâ facie* be taken as justifying their exercise of the power given by the "user" clause. But, in our opinion, a power upon bankruptcy to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy is invalid. The general rule on this subject was thus expressed many years ago by Mr. *Swanston* (1) in language which was adopted as accurate by Lord *Hatherley* in *Whitmore* v. *Mason* (2): "The general distinction," he says, "seems to be that the owner of property may, on alienation, qualify the interest

(1) 1 Sw. 481, n. (2) 2 J. & H. 204, 210.

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of his alienee by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law."

It was strenuously argued before us that the clause in question is clearly for the benefit, and not for the detriment, of the creditors, because, it is said, the completion of the ship will lessen the amount for which the Portuguese company might otherwise prove against the bankrupts' estate. But this argument appears to us fallacious, because, in the absence of the clause in question, the trustee in the bankruptcy would have had the election to complete the ship or not as might seem best for the creditors, but the presence of this clause has transferred that election to the buyers, and put them in possession of a power to complete the ship when the trustee might prefer to abandon it. It has been further argued that *Black & Drury* can justify the conversion under the "user" clause, as arising on the cesser for working for fourteen days, on the ground that the receiver had in fact refused to go on, and that, although the fourteen days had not run out, there was every reason to believe that the work never would be recommenced. But, in our opinion, it is not competent to the buyers, having entered as for the bankruptcy, to rely on a subsequent cesser of working. No doubt, an entry may be justified on the ground of any one or more of the stipulated events antecedent to the entry. But we think that a cesser of working after an entry is not a cesser of working within the intent and meaning of the agreement. Furthermore, *Black & Drury* commenced working on the ship within the fourteen days allowed, and thereby, in our opinion, in fact prevented a resumption of work by the builders or those claiming under them. It was indeed suggested that the receiver had declared his intention of not further prosecuting the work. But, even if he had authority so to do, there is no satisfactory evidence of his having communicated to the Appellants any fixed intention on his part not to complete the ship. We conclude, therefore, that *Black & Drury* cannot justify their

conversion of the property of the bankrupt, if such conversion shall be found to have taken place, in fact it follows from what we have said that, in our opinion, the motion must be dismissed as against *Barter & Co.*, with costs here and in the Court below, and that as regards *Black & Drury* the order of the Registrar should be varied, and should, as varied, stand as follows:—That an inquiry be directed to ascertain what (if any) of the materials or things (other than as aforesaid), which on the 7th of March, 1883, were in or about the dockyards, have been used or disposed of by *Black & Drury*, or their servants or agents, in or about the construction of the ship, and removed from the dockyard since the 7th of March, 1883. And also the value of such materials and things (if any) so used or disposed of and removed as aforesaid. And the Court doth direct that, for the purposes of such inquiry, *Black & Drury* do, within fourteen days after service of this order, furnish to the trustee an account in writing of all such materials and things so used or disposed of by them or their servants, or agents, and removed as aforesaid. And that *Black & Drury* do pay to the trustee the value of the said materials and things so used or disposed of and removed, within fourteen days after service of any certificate or report made on the said inquiry.

The costs of *Black & Drury* of the motion and order in the Court below, and in this Court, and the costs of the trustee and of *Black & Drury* of the inquiry, will be reserved to be dealt with by the Court of Bankruptcy.

Solicitors for *Barter & Co.: Kearsey, Son, & Hawes.*
Solicitors for *Black & Drury: Lowless & Co.*
Solicitors for the trustee: *Stocken & Jupp.*

W. L. C.

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In re CANNOCK AND RUGELEY COLLIERY COMPANY.

Company—Transfer of Shares—Refusal of Company to register Transfer—Liquidation of Shareholder—Right of Trustee in Liquidation to be admitted on the Register.

A trustee in liquidation of a shareholder who has transferred his shares by way of mortgage, but whose transfer has not been registered by the company on the ground of the shareholder being indebted to the company, has a right to be placed on the register of shareholders; subject, as to the shares, to all the equities that may subsist therein.

MOTION.

The *Cannock and Rugeley Colliery Company, Limited*, were incorporated by registration on the 29th of January, 1868, with articles of association which excluded Table A.

Clause 15 of the articles was as follows:—

"The instrument of transfer of any share in the company shall be executed both by the transferor and the transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof."

Art. 17. "The directors may decline to register a transfer of any share or shares whilst the member making the same is, either alone or jointly with any other person, indebted to the company, on any account whatsoever, or if they shall consider that the transferee or transferees is or are irresponsible persons."

Art. 20. "Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or by marriage of any female member, or in any way other than by transfer, may be registered as a member, upon such evidence being produced as may from time to time be required by the directors."

Art. 21. "Any person who has become entitled to a share in the manner mentioned in the preceding clause may, instead of being registered himself, request the directors to permit some person, to be named by him, to be registered as a transferee of such share.

Art. 24. "Any transfer, or pretended transfer, of any share, not being approved by the directors shall be absolutely void, and notice of such non-approval shall forthwith be sent to the member purporting to transfer such share."

Of the above, arts. 15, 20, and 21, are substantially identical with articles 8, 13, and 14 of Table A.

Since the 30th of September, 1872, the registered holder of twenty-seven shares in the company of £80 each, all fully paid up, had been, and still was, *Edward Copson Peake*.

On the 25th of August, 1876, a transfer of twelve of the above shares was executed by *Peake* to *John Maper Richardson* as a nominee of *Lloyds' Banking Company, Limited*, and on the 29th of August, 1878, two other transfers of twelve shares and three shares respectively were executed by *Peake* to *Howard Lloyd*, also as nominee of the same bank; and the three transfers were duly executed by the transferees.

On the 30th of October, 1883, the bank's solicitors gave notice to the company that *Peake's* shares had been deposited with the bank by way of equitable mortgage, and requiring them not to permit a transfer of the shares without the consent of the bank; and on the 7th of November following the bank's solicitors forwarded the transfers to the company for registration.

On the 12th of November, 1883, *Peake* filed a liquidation petition, and on the 29th of November the applicant *Charles Augustus Harrison* was appointed trustee of his estate.

At a board meeting held on the 28th of November, 1883, the directors refused to register the transfers to the bank, on the ground that *Peake* was indebted to the company in a sum of £2465 0*s*. 9*d*. for coals delivered; and on the same day notice of this refusal was given by the directors to the bank's solicitors.

On the 30th of November, 1883, the bank's solicitors wrote asking that the transfers and certificates might be returned to them, and they were returned shortly afterwards.

On the 25th of January, 1884, the applicant *Harrison*, the trustee, gave the company notice of his appointment and made an application to them to allow him to be registered as a member of the company in respect of the shares. On the 20th of February the directors answered declining to admit him as member.

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On the 21st of February, 1884, *Harrison's* solicitors wrote to ask what were the grounds of the company's refusal, and stating that they were instructed not only by the trustee but also by the bank and by *Richardson* and *Lloyd*, and that the application of the trustee was made with their knowledge and approval. They added that Mr. *Harrison*, of course, claimed the dividend on the shares in question.

On the 20th of March the company's solicitors wrote to say that the directors refused Mr. *Harrison's* application, and *Harrison* thereupon served the company with a notice, dated the 26th of March, 1884, of the present motion, that the register of the company might be rectified by entering therein the name of *Harrison* in respect of the twenty-seven shares.

Millar, Q.C., and *H. Burton Buckley*, for the motion:—

We move under sect. 35 of the *Companies Act*, 1862.

The right of a trustee in liquidation to be admitted to the register in respect of shares held by the debtor is established by *In re Bentham Mills Spinning Company* (1), where the articles of association were practically the same as the present.

Marten, Q.C., and *Frederic Thompson*, for the company:—

We do not dispute the authority of the case cited, but this is a very peculiar case. The real owners of the shares are the banking company. It was their application to register the transfer that was refused; and it is they who are now endeavouring to avail themselves of the position of the trustee in the liquidation, who has no actual interest in the shares, and to get the shares registered in his name, in order that they may deal with them without regard to the company's debt. The attempt is a mere trick, inasmuch as the trustee has not, and never had, any interest in the shares. He has not "become entitled" within the terms of art. 21. Even if the bank were to abandon their security, the trustee would not "become entitled" under art. 21. If he claims with the consent of *Lloyd's Banking Company*, that means that he applies as their agent, and not under art. 21. The Court, in fact, is asked indirectly to repeal art. 17 altogether.

(1) 11 Ch. D. 901.

[BACON, V.C.:—Of what use to the bank is an unregistered transfer?]

If the debt is transferred or paid off, the transfer may be registered.

[BACON, V.C.:—But the company has the first lien on the shares.]

Then the case cited has no application.

[BACON, V.C.:—The trustee may redeem the shares.]

That would be a different thing; but until he redeems, he has no interest.

[BACON, V.C.:—What harm can there be to the company by admitting the trustee? He is only the legal owner of the shares.]

He is not the true owner. He can only take the interest of the debtor. If a trustee of stock becomes bankrupt, the trustee in bankruptcy of the trustee does not become the legal owner of the stock.

[BACON, V.C.:—But if the company refuse to register, the transfer to the bank is void as far as the company are concerned.]

The debtor nevertheless is trustee for the banking company, and he has no interest which can pass to the trustee in liquidation.

The transfer to *Lloyd's Banking Company* was executed in due form, and though the company refused to register on the ground of the transferor's indebtedness, that impediment might, any day, have been removed by payment, and then it would become the duty of the company to register. So that there was a legal transfer, and when the liquidation occurred, there was no interest in the shares to pass to the trustee: *Ex parte Sargent* (1).

BACON, V.C.:—

The argument is not helped by ringing the changes on the words "legal" and "equitable." There was only one owner of the shares originally, namely, the liquidating debtor; and he

(1) Law Rep. 17 Eq. 273.

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remained the only legal owner until he went into liquidation. In the meantime he made a mortgage of these shares, and disposed of them to a transferee, but he did not succeed in perfecting the transfer, and he remained, therefore, the legal owner. He being the legal owner, his liquidation vests that legal ownership in the trustee in the liquidation. There is no kind of relation between this case and that which Mr. *Marten* put to me, namely, that of a trustee of stock who becomes bankrupt. The stock does not pass to the trustee in bankruptcy, because there are *cestuis que trust* who are entitled to it. Here, nobody but the debtor is entitled to these shares. The transaction between the debtor and *Lloyd's Banking Company* was a useless thing, it could not be carried into effect—it may have amounted to some contract between the debtor and *Lloyd's Banking Company* for him to perform if he could, or to bear the consequence of, but he cannot alter the legal state and condition of the shares by anything that he does with the banking company. The legal right is in the debtor's trustee to be admitted into the place of the debtor, and no more. It takes nothing from him, gives nothing to anybody, leaves things exactly as they were, and the trustee in the liquidation can make no improper use of it, for he cannot transfer the shares without paying the debtor's debt. Then he may transfer to whomsoever he will, subject to any equities that may subsist between him and the bank.

The order will be in the form of the notice of motion.

Millar asked for the costs, and damages; and on the latter point argued that the trustee would be entitled by way of damages to a dividend of £7 10*s.*, which had been declared on the shares in the meantime.

BACON, V.C.:—

The trustee is not entitled to the dividends; the company are entitled to retain the dividends as well as the shares until their debt is paid. There is a general lien by the company on these shares in respect of any debt due to them by the shareholder. The trustee's name will be substituted on the register instead of that of the debtor; subject to all the rights and equities that

exist. The applicant must have from the company his costs of the application.

Solicitors: *Smiles, Binyon, & Ollard,* agents for *Duignan, Lewis, & Elliot, Walsall; Field, Roscoe, & Co.,* agents for *Gardner & Sons, Rugeley.*

J. B. D.

In re BRENTFORD AND ISLEWORTH TRAMWAYS COMPANY.

Winding-up—Unregistered Company—Tramway Company—"Railway Company"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 199 [*Revised Ed. Statutes, vol. xiv., p.* 247].

An unregistered tramway company incorporated by a special Act does not fall within the exception of "railway companies incorporated by Act of Parliament" in sect. 199 of the *Companies Act,* 1862, and it may therefore be wound up under that section.

THIS was a creditor's winding-up petition under the *Companies Acts,* 1862 and 1877. The company was an unregistered tramway company incorporated by "*The Brentford and Isleworth Tramways Company Act,* 1879."

Horton Smith, Q.C., and *Dauney,* for the Petitioner, asked for an order under sect. 199 of the *Companies Act,* 1862.

Emden, for a creditor, in support.

Reginald Hughes, for the company:—

I submit that this company is a "railway company incorporated by Act of Parliament" within the exception contained in the 199th section, and therefore cannot be wound up under that Act. A "tramway" is by several Acts of Parliament included in the definition of a "railway" or "railroad": *The Railway Securities Act,* 1866, s. 2; *The Regulation of Railways Act,* 1868, s. 2; *The Regulation of the Forces Act,* 1871, s. 16.

In re Exmouth Docks Company (1), *Re Isle of Wight Ferry*

(1) Law Rep. 17 Eq. 181.

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In re BRENTFORD AND ISLEWORTH TRAMWAYS COMPANY.

Company (1), and *In re Electric Telegraph of Ireland* (2), were referred to.

BACON, V.C.:—

I cannot hold this to be a "railway company," and I therefore make the usual winding-up order.

Solicitors: *W. Beck; Lickorish & Bellord; Hughes, Masterman, & Rew.*

(1) 2 H. & M. 597. (2) 22 Beav. 471.

G. I. F. C.

COLES *v.* CIVIL SERVICE SUPPLY ASSOCIATION.

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Feb. 12.

[1883. C. 4623.]

Practice—Third-party Procedure — Claim to Indemnity over — Third-party Notice, Appearance to—Application by Defendant for Directions—Non-admission of Liability—Liberty to appear at Trial.

Where in an action for damages in respect of alleged injury to the Plaintiffs' premises, the Defendant, claiming to be entitled to indemnity over against a person not a party to the action, had served such person with a third-party notice under Order XVI., rule 48, and he had appeared thereto, the Court, upon a summons for directions taken out by the Defendant, gave the third party, who did not admit his liability, liberty to appear at the trial of the action and take such part as the Judge should direct, and be bound by the result, and ordered the question of his liability to indemnify the defendant to be tried at the trial of the action but subsequent thereto.

In case a third party served with notice appears and admits his liability to indemnify the Court will give him leave to defend the action.

Form of the order made.

SUMMONS FOR DIRECTIONS.

This was an action by the lessees of a messuage against the occupiers of adjoining premises for damages in respect of alleged structural injury to the Plaintiffs' messuage by the pulling down of a portion of a party wall, and the Plaintiffs also claimed an injunction.

The Defendants had employed one *Shaw*, a builder, to carry out certain alterations in their buildings, and, alleging their right under an agreement with *Shaw* to be indemnified by him against all damage to adjoining premises (including that of which the Plaintiffs complained), they served upon him a third-party notice under the Rules of Court, 1883, Order XVI., rule 48.

Shaw appeared to the notice, and the Defendants then took out a summons for directions under Order XVI., rule 52.

H. B. Buckley, for the Defendants, in support of the summons.

Ingle Joyce, for *Shaw*:—

The work complained of, and which caused the injury, if any,

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was not within the contract between *Shaw* and the Defendants, and he does not admit his liability to indemnify the Defendants.

Buckley then asked, under Order XVI., rules 52, 53, and 54, for directions as to the mode in which the question of *Shaw's* liability to make the indemnity claimed should be determined.

Oswald, for the Plaintiffs:—

This case is not within the rules as to third-party procedure. There is here no *bonâ fide* claim for indemnity, and the trial of the action ought not to be delayed, to our possible prejudice, by any proceeding to bring in a third party, when we are suing the persons who actually did the damage.

[He referred to *Pontifex* v. *Foord* (1); *Jacobs* v. *Brown*, before *Mathew*, J., in Chambers, January 25, 1884.]

KAY, J.:—

I think the proper orders to be made in cases like the present are these: If the third party admits his liability to indemnify the defendant, the Court should give him liberty to defend the action. But if he does not admit his liability then the Court should give him liberty to appear at the trial of the action and take such part therein as the Judge shall think proper to allow, and should direct the question as to his liability to indemnify the defendant to be determined immediately after the trial of the action.

And the latter is the order that I shall make in this case. If the parties do not wish to have the question of liability decided at the trial they can make other arrangements. The object of these rules is, as I take it, to enable all questions between the parties interested to be tried in one action without the necessity of instituting a second action. The costs of this application will be reserved until the trial.

The order as drawn up was in the following form:—

The application of the Defendants for directions consequent upon *George Shaw*, the person served with a third-party notice filed the 21st of December,

(1) 12 Q. B. D. 152.

1883, in this action, pursuant to the order dated the 28th of November, 1883, having appeared to such notice, which, upon hearing the solicitors for the applicant and for the Plaintiffs and the said *George Shaw* in Chambers, was adjourned to be heard in Court, coming on this day accordingly, and upon hearing counsel for the applicant for the Plaintiffs and for the said *George Shaw*, and upon reading the order dated the 2nd of November, 1883, and the said *George Shaw* by his counsel not admitting any liability to indemnify the Defendants in respect of the Plaintiffs' claim, this Court doth order that the said *George Shaw* be at liberty to appear at the trial of this action and take such part as the Judge shall direct, and be bound by the result of the trial.

And it is ordered that the question of the liability of the said *George Shaw* to indemnify the Defendants be tried at the trial of this action but subsequent thereto. The costs of the said application are reserved.

Solicitors: *Lewis Heritage*; *Tathams & Pym*; *Gresham & Davies.*

W. W. K.

In re BOYES.
BOYES *v.* CARRITT.

[1883 B. 336.]

Will—Bequest on Indefinite Trust—Communication of Object of Trust to Trustee after Testator's Death.

A. B. instructed his solicitor to prepare for him a will leaving all his property to the solicitor himself absolutely, but to be held and disposed of by him according to written directions to be subsequently given, and a will was prepared and executed accordingly under which the solicitor was universal legatee and sole executor.

No such directions were however given to the solicitor by the testator in his lifetime, but after his death an unattested paper was found by which the testator stated his wish that *X. Y.* should have all his property except a small sum of money which he gave to the solicitor. The solicitor claimed no beneficial interest in the testator's property except to the extent of his legacy, and claimed to hold the rest of the property as trustee for *X. Y.*:—

Held, that as the testator had not in his own lifetime communicated to the solicitor the object of the trust no valid trust in favour of *X. Y.* had been constituted, and accordingly that the solicitor held the property as trustee for the next of kin of the testator.

THE will of the testator in this cause, dated the 1st of June, 1880, was in these words: "This is the last will and testament of me, *George Edmund Boyes*, of . . . I direct the payment of my

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just debts and funeral and testamentary expenses as soon as conveniently may be after my decease by my executor hereinafter named, and subject thereto I give, devise, and bequeath all my real and personal estate whatsoever and wheresoever unto *Frederick Blasson Carritt* absolutely. And I appoint the said *Frederick Blasson Carritt* sole executor of this my will."

The testator died in April, 1882, at *Ghent*, leaving personal property only. Immediately after his death probate was granted to Mr. *Carritt*. Thereupon the Plaintiff, *John F. Boyes*, one of the brothers and next of kin of the testator, instituted proceedings in the Probate Division of the High Court to recall probate. Mr. *Carritt*, who was the Defendant in that action, was the solicitor and a private friend of the testator, and had himself prepared the will, and in answer to interrogatories administered to him in the probate action, Mr. *Carritt* stated as follows: That the testator communicated his intentions to him at the time when he made his will (which was made in *London*), and that such intentions were that the Defendant should take the property as trustee upon trust to deal with it according to further directions, which the testator was to give by letter after his arrival on the Continent, whither he was then going within a day or two; and that he (Mr. *Carritt*) accepted the trust. That the deceased did go to the Continent within a day or two, but never gave any further directions in his lifetime. Upon receiving this answer the validity of the will was admitted, and the action to recall probate was discontinued.

This action was shortly afterwards brought by the next of kin of the testator against Mr. *Carritt* in order to obtain a declaration that they were beneficially entitled to his personal estate.

In his defence, Mr. *Carritt* said that in giving the instructions the testator expressed to him verbally his desire to provide for a certain lady and child, whose names he did not wish to appear in his will, and he therefore desired to leave the whole of his property to the Defendant as trustee to act with respect thereto according to any further written directions which might be given to him.

In his oral evidence in this action the Defendant confirmed these statements as accurately representing what he believed at

the time, and said: "I gathered that I was to dispose of the estate as Mr. *Boyes* would direct me—the word 'trustee' was never used—the understanding was that he was to write to me, and I was to comply with his directions."

No such directions were ever in fact given by the testator to Mr. *Carritt* in his lifetime, but after his death there were found among his papers two letters, one dated the 10th of February, 1880 (which was proved to be a mistake for 1881), written at *Antwerp*, and which was in these words:—

"*F. B. Carritt*, Esq.

"I wish you to have five and twenty pounds of any property of which I may die possessed for the purchase of any trinket *in memoriam*, everything else I give to *Nell Brown*, formerly *Sears*, and I appoint you sole trustee to act at your discretion.

"*G. E. Boyes.*"

The other letter was in these terms:—

"4th June, 1881.

"*F. B. Carritt*, Esq.

"Dear Sir,—In case of my death I wish *Nell Brown* to have all except twenty-five pounds in my memory.

"*G. E. Boyes.*"

Neither of these letters was executed as a testamentary instrument.

Mrs. *Brown* was examined in this action, and she stated that the testator told her that he had written two letters to Mr. *Carritt*, one in case the other was lost. He directed her in case of his death to send immediately for Mr. *Carritt*. She did so, and having found these two letters among his papers, she placed them in Mr. *Carritt's* hands shortly after the testator's death.

Rigby, Q.C., and *Phillimore*, Q.C., for the Plaintiffs:—

A trust the object of which is not communicated to the trustee during the lifetime of the testator is not effectual, and as the Defendant *Carritt*, has admitted himself to be a trustee, and does not set up any pecuniary interest (so that there is no room for fraud), he must (this being personal estate) be a trustee for the next of kin of the testator.

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Hastings, Q.C., and *Oswald*, for the Defendant:—

We claim to hold the testator's property as trustee for Mrs. *Brown*, in accordance with the directions contained in the letters. They referred to *Wallgrave* v. *Tebbs* (1); *McCormick* v. *Grogan* (2), and *In re Fleetwood* (3).

Simmonds, for Mrs. *Brown*:—

The trust in favour of Mrs. *Brown* is completely constituted. The subject was defined by the will, the object was defined by the letters, and there has been transfer of the property to the trustee and acceptance by him: *Jarman* on Wills (4); *Fenton* v. *Hankins* (5). The communication to the trustee of the object of the trust may be after the date of the will: *Moss* v. *Cooper* (6); *McCormick* v. *Grogan*. In *Norris* v. *Frazer* (7); the object of the trust was not communicated until the death-bed of the testator. The trustee need not know the exact trust on which he is to take the property: and if the trust is complete the fact that the object of it was not communicated to the trustee until after the testator's death, will not destroy the trust: *Donaldson* v. *Donaldson* (8); *Re Way's Trusts* (9). Otherwise a mere accident, such as a neglect to post a letter or a delay in its delivery, might vitiate a trust for the constitution of which everything possible had been done by the settlor.

[He also referred to *Pring* v. *Pring* (10).]

Rigby, in reply:—

The doctrine of *Moss* v. *Cooper* is this. If a man who is expecting to get an advantage under a will allows the testator to believe that he will carry out the instructions the testator has communicated to him, the person in whose favour the trust is declared has a personal equity against that man to oblige him to carry out the trust. But no trust of which he has never heard can be fastened upon his conscience. The true principle is that the object of the

(1) 2 K. & J. 313.
(2) Law Rep. 4 H. L. 82.
(3) 15 Ch. D. 594.
(4) 4th Ed. vol. i., p. 395.
(5) 9 W. R. 300.
(6) 1 J. & H. 352.
(7) Law Rep. 15 Eq. 318.
(8) Kay, 711.
(9) 2 D. J. & S. 365.
(10) 2 Vern. 99.

trust must be communicated to the trustee by the testator in his lifetime. Otherwise the trust is not binding, and this for two reasons. First, until the communication is complete, it can be modified by the testator, and so is ambulatory and no trust at all, while after the death the testator is no longer owner of the property. Secondly, unless the testator communicates it in his lifetime he is reserving to himself the power of making nuncupative and informal wills from time to time, and so of repealing the statutes.

KAY, J.:—

As the point is a new one, I shall reserve my judgment.

March 29. KAY, J. (after stating the facts of the case, continued):—

The result of this is that Mr *Carritt* admits that he is a trustee of all the property given to him by the will. He desires to carry out the wishes of the testator as expressed in the two letters, but of course he can only do so if they constitute a binding trust as against the next of kin.

If it had been expressed on the face of the will that the Defendant was a trustee, but the trusts were not thereby declared, it is quite clear that no trust afterwards declared by a paper not executed as a will could be binding: *Johnson* v. *Ball* (1); *Briggs* v. *Penny* (2); *Singleton* v. *Tomlinson* (3). In such a case the legatee would be trustee for the next of kin.

There is another well-known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it, has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property, or some part of it in a specified manner. In these cases the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the

(1) 5 De G. & Sm. 85. (2) 3 Mac. & G. 546.
(3) 3 App. Cas. 404.

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gift. The principle of these decisions is precisely the same as in the case of an heir who has induced a testator not to make a will devising the estate away from him by a promise that if the estate were allowed to descend he would make a certain provision out of it for a named person: *Stickland* v. *Aldridge* (1); *Wallgrave* v. *Tebbs* (2); *McCormick* v. *Grogan* (3). But no case has ever yet decided that a testator can by imposing a trust upon his devisee or legatee, the objects of which he does not communicate to him, enable himself to evade the *Statute of Wills* by declaring those objects in an unattested paper found after his death.

The essence of all those decisions is that the devisee or legatee accepts a particular trust which thereupon becomes binding upon him, and which it would be a fraud in him not to carry into effect.

If the trust was not declared when the will was made, it is essential in order to make it binding, that it should be communicated to the devisee or legatee in the testator's lifetime and that he should accept that particular trust. It may possibly be that he would be bound if the trust had been put in writing and placed in his hands in a sealed envelope, and he had engaged that he would hold the property given to him by the will upon the trust so declared although he did not know the actual terms of the trust: *McCormick* v. *Grogan*. But the reason is that it must be assumed if he had not so accepted the will would be revoked. Suppose the case of an engagement to hold the property not upon the terms of any paper communicated to the legatee or put into his hands, but of any paper that might be found after the testator's death.

The evidence in this case does not amount to that, but if it did the rule of law would intervene, which prevents a testator from declaring trusts in such a manner by a paper which was not executed as a will or codicil. The legatee might be a trustee, but the trust declared by such an unattested paper would not be good. For this purpose there is no difference whether the devisee or legatee is declared to be a trustee on the face of the will, or by an engagement with the testator not appearing on the will. The

(1) 9 Ves. 516. (2) 2 K. & J. 313.
(3) Law Rep. 4 H. L. 82.

devisee or legatee cannot by accepting an indefinite trust enable the testator to make an unattested codicil.

I cannot help regretting that the testator's intention of bounty should fail by reason of an informality of this kind, but in my opinion it would be a serious innovation upon the law relating to testamentary instruments if this were to be established as a trust in her favour.

The Defendant, however, having admitted that he is only a trustee, I must hold, on the authority of *Muckleston* v. *Brown* (1); *Briggs* v. *Penny* (2); and *Johnson* v. *Ball* (3), that he is a trustee of this property for the next of kin of the testator. I can only hope they will consider the claim which this lady has upon their generosity.

Solicitors: *John Andrews; Reyroux, Phillips, & Golding; Bell, Brodrick, & Gray.*

(1) 6 Ves. 52. (2) 3 Mac. & G. 546.
(3) 5 De G. & Sm. 85.

W. W. K.

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Feb. 27, 28; *March* 10.

In re JOHNSTON.

COCKERELL *v.* EARL OF ESSEX.

[1883 J. 388.]

Will—Codicil—Plate—"To A. and his successors"—Leasehold House—"To A. and his successors to be enjoyed with and to go with the title"—Paintings—Statuary and China—"To A. and his successors, to be held and settled as heirlooms and to go with the title"—Absolute Interest—Executory Trust—Settlement—Contents of House—Jewellery at Bankers—Legacies—Pecuniary—Specific—"All Legacies to be paid free of legacy duty"—Legacy Duty.

A testatrix by a codicil to her will bequeathed to *A. C.*, sixth Earl of *E.* and to his successors, all her plate, and also gave, devised, and bequeathed a leasehold house to him and "to his successors and to be enjoyed with and to go with the title," and as to all her household furniture, paintings, books, china, and the whole contents of her house, she bequeathed the same to her trustees and executors upon trust that they should in the first place select and set aside a collection of the best paintings, statuary, and china for the said Earl of *E.*, and his successors, to be held and settled as heirlooms, and to go with the title," and she authorized them to give to the said Earl or his successors any articles of furniture which they should think fit, and as to all the rest and residue of the contents of her house upon trust for her trustees to select presents for her friends, and directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, and the moneys so received to form part of her residuary personal estate, and she directed all the legacies left by her will and codicil to be paid free of legacy duty.

The testatrix died possessed of considerable personal estate, which comprised amongst other things a number of articles of jewellery which were at her death in a box at her bankers, which jewellery had been bequeathed to her. It was proved that it had been the practice of the testatrix and also of the former owner to send such box for safe custody to the bankers when they respectively were away from London.

Held, first, that the plate and leasehold house passed to the sixth Earl absolutely; the words "to be enjoyed with and to go with the title" not being sufficient in themselves to create an executory trust or to cut down the interest to a life estate.

Montagu v. *Lord Inchiquin* (1) discussed.

Secondly, that the gift to the trustees of the whole contents of the house upon trust to "select and set aside a collection of the best paintings, statuary, and china, for the said Earl of *E.* and his successors, to be held and settled as heirlooms and to go with the title" was a clear

(1) 23 W. R. 592.

direction to settle and created an executory trust, and a settlement was directed (to be settled in chambers) giving a life interest to the sixth Earl with remainder to the next heir to the Earldom for his life.

Thirdly, that the box of jewellery passed to the trustees as part of the contents of the house, that being the locality to which the property ought to be ascribed, although jewellery is merely for personal use and is not appropriate to a house.

Lastly, that under the words "all the legacies left by my will and codicil to be paid free of legacy duty," the legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only.

Ansley v. *Cotton* (1) discussed and followed.

SPECIAL CASE.

Esther Matilda Johnston, by her will, dated 2nd of September, 1874, gave all her real and personal estate to her aunt *Catherine*, widow of *George* fifth Earl of *Essex*, absolutely, and appointed the said *Catherine* Countess of *Essex* executrix, and the Plaintiffs, *Andrew Pepys Cockerell* and *John Hassard* executors thereof.

The testatrix, by a codicil dated the same day, after reciting her will, she, in the event of the said *Catherine* Countess of *Essex* dying in her (the testatrix's) lifetime (which event happened) devised and bequeathed all her real and personal estate and all her residuary personal estate to the Plaintiffs, *Andrew Pepys Cockerell* and *John Hassard*, their heirs, executors, and administrators respectively, upon trusts for sale and conversion, and to stand possessed of the moneys to be produced thereby, and all other moneys, forming part of her residuary personal estate upon trust as to one fourth part for the Defendant *Charles Viret Stephens*, as to one other fourth part thereof for the Defendant *Samuel John Stephens*, as to one other fourth part thereof for the Defendant *Charles Edward Stephens*, as to one eighth part thereof for the Defendant *Frederick Smith*, and as to the remaining eighth part thereof for her cousin *Julia Smith*; and in case any of the Defendants, *Charles Viret Stephens*, *Samuel John Stephens*, *Charles Edward Stephens*, and *Frederick Smith*, and the said *Julia Smith*, should not be living at the decease of the testatrix she declared that the share and interest thereby given to him or her in the

(1) 16 L. J. (Ch.) 55.

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said premises should go to his or her executors or administrators, to be applied as if the same had formed part of his or her personal estate at his or her death.

Catherine Countess of *Esssex* died on the 22nd day of February, 1882, having by her will, dated the 2nd day of September, 1874, left all her property to the testatrix, *Esther Matilda Johnston*, absolutely. Her property, to a considerable extent, was derived from the *Essex* family, and included a leasehold house, No. 9, *Belgrave Square*, and certain valuable plate, paintings, statuary, and china, in the said house, all of which had been bequeathed to her absolutely by her husband, the late *George* fifth Earl of *Essex*, and the whole or nearly the whole of which had been for a very considerable period the property of the Earls of *Essex* for the time being or of members of their respective families.

The testatrix *Esther Matilda Johnston* resided with the Countess of *Essex* for many years previously to her death, and was well aware of the facts above mentioned.

The testatrix by a second codicil, dated the 11th of March, 1882, after revoking certain specific bequests, proceeded as follows:—"I bequeath to my friend Viscountess *Malden* a legacy of £1000, and to each of her four daughters and to her younger son, a legacy of £400 a-piece. I bequeath to the Right Honourable *Algernon Capell* sixth Earl of *Essex*, and to his successors, all my plate; I also give, devise, and bequeath my said leasehold or other residence, No. 9, *Belgrave Square*, aforesaid, with outbuildings, stables, and the lease thereof to the said Earl of *Essex* and to his successors, and to be enjoyed with and to go with the title."

And after appointing the Plaintiff *Grenville Charles Lennox Berkeley* to be a trustee and executor of her will together with the Plaintiffs *John Hassard* and *Andrew Pepys Cockerell*, and giving him a legacy in that character, she proceeded as follows:—"As to all the household furniture, paintings, pictures, books, china, and the whole contents of my said house, No. 9, *Belgrave Square*, aforesaid, I bequeath the same to my said trustees and executors and to the survivors or survivor of them upon trust that they do and shall in the first place select and set aside

a collection of the best paintings, statuary, and china for the said Earl of *Essex* and his successors, to be held and settled as heirlooms and to go with the title, and I authorize them to give to the said Earl of *Essex* or his successors any articles of furniture if they shall think fit, and as to all the rest and residue of the contents of my said house upon trust for my trustees and executors to select presents for any of my late dear aunt *Catherine* Countess of *Essex* and my own dear friends, and to present them as a remembrance of us, and I desire each trustee to retain a remembrance for himself. And I direct my trustees to present any portion of the residue of the contents of my said house to my cousins if they shall think fit, or to sell the same or any part or parts thereof, and the moneys so received to form part of my residuary personal estate." And after giving two pecuniary legacies the testatrix proceeded as follows: "And I direct all the legacies left by my will and codicil to be paid free of legacy duty."

The testatrix died on the 17th of December, 1882, possessed of considerable personal estate, which comprised, amongst other things, plate of considerable value, to all of which she was entitled both at the date of her last two codicils and of her death, the said leasehold house, No. 9, *Belgrave Square*, certain paintings, statuary, and china in or about the said house, and of very considerable value, and articles of jewellery of considerable value, which at the testatrix's death were in a box at her bankers. The articles of jewellery were all personal ornaments, and belonged to the said *Catherine* Countess of *Essex* up to her death and passed to the testatrix absolutely under her will. The box and the jewellery contained therein were, during the lifetime of the said *Catherine* Countess of *Essex*, kept at the bankers during part of the year and were kept in the house, No. 9, *Belgrave Square*, where the said *Catherine* Countess of *Essex* and the testatrix lived together during the remainder of the year. After the death of *Catherine* Countess of *Essex* the same course was adopted with regard to the box and the jewellery contained therein during the life of the testatrix.

An extract from the bankers' ledger shewing the dates when the box of jewellery was received by them, and when the same

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was delivered to the Countess and to the testatrix respectively, accompanied and formed part of the special case.

The special case then stated that under family settlements and the will of his late father, the Defendant *Algernon Capell* Earl of *Essex* was tenant for life of large landed estates settled in such a manner as that the possession or receipt of the rents and profits thereof might devolve with the Earldom of *Essex;* that the Defendant *George De Vere* Lord *Capell* was the eldest son of the late Viscount *Malden,* who was the eldest son of the Defendant *Algernon Capell* Earl of *Essex,* and was heir apparent to the said Earldom and tenant in tail in remainder after the death of the Defendant *Algernon Capell* Earl of *Essex* of the settled estates; that Viscount *Malden* in the second codicil mentioned had at the date of that codicil and had then four children besides the Defendant *George De Vere* Lord *Capell,* and further, that the Plaintiffs had in the execution of the trust in that behalf contained in the second codicil, duly selected and set aside a collection of the best paintings, statuary, and china of the testatrix, but questions having arisen how and in what manner the same ought to be settled or dealt with by the Plaintiffs so as to carry into effect the directions of the testatrix contained in the second codicil, and also as to the true construction and effect of the bequests to or in favour of the children of the said Viscountess *Malden,* and of the gifts of the plate of the house No. 9, *Belgrave Square,* and of the direction as to the payment of legacy duty in the second codicil respectively contained, and also with reference to the jewellery contained in the box at the bankers, this action was commenced for the purpose of having the rights and interests of all parties under the said gifts and directions ascertained and declared, and the following were the questions submitted for the opinion of the Court:—

1. What pecuniary legacies and of what amounts were by virtue of the second codicil payable to the children of the said Viscountess *Malden* respectively.

2. Who under or by virtue of the gift of plate in the second codicil contained were or was entitled to the plate belonging to the testatrix at her death, and for what interest, or whether the gift was void.

3. Who under or by virtue of the gift of the leasehold house, No. 9 *Belgrave Square*, in the same codicil contained, were, or was entitled thereto, and for what estates or interests therein, or whether the gift was void.

4. Whether the paintings, statuary, and china so set apart by the Plaintiffs ought to be held or settled upon trust for the Defendant *Algernon Capell* Earl of *Essex* for life, and after his death upon trust for the Defendant *George De Vere* Lord *Capell* for life, and after his death upon trust for the first and other sons of the last-named Defendant successively in tail male, or upon what trusts and in what manner the paintings, statuary, and china ought to be held or settled, and what were the respective rights and interests of the beneficiaries therein under the said second codicil.

5. Whether the jewellery contained in the box at the bankers at the testatrix's death was comprised in the gift of the contents of the house No. 9, *Belgrave Square*, and whether the Plaintiffs were justified in selecting thereout presents for intimate friends of the said *Catherine* Countess of *Essex* and the testatrix.

6. Whether under or by virtue of the direction contained in the second codicil that all the legacies should be paid free of legacy duty, the legacy duty payable in respect of the plate, paintings, statuary, and china, and the presents (if any) to be made by the Plaintiffs out of the contents of the said house and other the articles specifically bequeathed by the testatrix was payable out of her residuary estate, or ought to be paid by the specific legatees or donees, or how the same was payable.

Macnaghten, Q.C., and *Rowden*, for the executors and trustees.

Whitehorne, Q.C., and *Farwell*, for the Earl of *Essex*, upon the points raised by questions 2, 3, and 4 of the special case:—

The effect of the gifts of the plate and house in *Belgrave Square* to the Earl of *Essex* is to vest the same in him absolutely, and we submit that he is also entitled absolutely to the paintings, statuary, and china, which are by the codicil to be held and settled as heirlooms: *Shelley* v. *Shelley* (1); *In re Viscount Ex-*

(1) Law Rep. 6 Eq. 540.

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mouth (1); *Tollemache* v. *Earl of Coventry* (2); *Countess of Harrington* v. *Earl of Harrington* (3); *Christie* v. *Gosling* (4).

They also cited *Mackworth* v. *Hinxman* (5); *Rowland* v. *Morgan* (6); *Bacon* v. *Proctor* (7); *Ring* v. *Hardwick* (8); *Webb* v. *Herring* (9); *Lord Dungannon* v. *Smith* (10); *Miles* v. *Harford* (11); *Sugden's* Law of Property (12).

Romer, Q.C., and *Northmore Lawrence*, for Lord *Capell*:—

The Earl is only entitled to a life interest in the plate and house in *Belgrave Square*, and to the paintings, statuary, and china, and we submit that Lord *Capell* is absolutely entitled to the same in reversion expectant on the death of the Earl, or at any rate to some estate or interest therein after his death. *Montagu* v. *Lord Inchiquin* (13) is directly in point, the bequest being almost identically the same as in this case. There a testatrix bequeathed diamonds and china to *Lucius*, Lord *Inchiquin*, "as head of the existing family," and so far as she lawfully could directed that they should be "deemed heirlooms in the family of *Inchiquin*, and shall be held and enjoyed by the person for the time being bearing the title of Baron *Inchiquin*." *L.* died in the lifetime of the testatrix, and was succeeded by *E.*, and Vice-Chancellor *Hall* held that although the first bequest was not executory, *L.* if he had survived the testatrix would only have taken a life interest in the diamonds and china, with remainder to the person who would succeed him, and that consequently *E.* was entitled to have the chattels delivered to him, but without prejudice to the question whether he was entitled for life only or absolutely.

Whitehorne, in reply.

His Lordship reserved judgment on the above points, and delivered the following judgment on the 10th of March 1884.

(1) 23 Ch. D. 158.
(2) 2 Cl. & F. 611.
(3) Law Rep. 5 H. L. 87.
(4) Ibid. 1 H. L. 279.
(5) 2 Keen, 658.
(6) 2 Ph. 764.
(7) T. & R. 31.
(8) 2 Beav. 352.
(9) 8 Vin. Abr. 209.
(10) 12 Cl. & F. 546.
(11) 12 Ch. D. 691.
(12) Page 330.
(13) 23 W. R. 592.

CHITTY, J.:—

The questions I have now to dispose of relate, first, to the plate; secondly, to the leasehold house in *Belgrave Square*; thirdly, to the collection of paintings, statuary, and china; and, fourthly, to the furniture.

The point was discussed whether these bequests were to be construed separately or together, so that the same meaning might be attributed to all of them. The gifts of the plate, the leasehold house, and the collection of paintings, statuary, and china are contained in separate and independent clauses, and the language employed is in each case different. As the testatrix proceeds she no doubt becomes more definite in her meaning and in her expressions. There are no words of reference between the gifts, and there is an essential distinction at least between two of them; that which relates to the plate, and that which relates to the collection. The former is given by direct gift, and the latter through the medium of trustees, and there is a direction to settle which makes the latter gift executory. There does no doubt appear some common intent underlying each clause, but it is not expressed. Now the general rule on this subject is well stated in Mr. *Jarman's* work on Wills (1): "Several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both. There must be an apparent design to connect them." I have referred to the authorities which he cites, and they justify the terms in which the rule is expressed.

That being so I proceed to consider the bequests separately. The first is of the plate, a direct gift to the sixth Earl and his successors. It appears to me to be covered by Lord *Cottenham's* decision in *Rowland* v. *Morgan* (2). In that case there was a bequest of certain things by the Earl of *Abergavenny* to his son *John*, Viscount *Neville*, and his heirs Earls of *Abergavenny* to be held as heirlooms, with a direction to the executors to make an inventory; and there was also a codicil relating to heirlooms in

(1) 4th Ed. vol. ii. p. 843.

(2) 2 Ph. 764.

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the family. It was held by Lord *Cottenham* that that was a direct gift not executory, and a gift which the Court could not model. The only heirship there referred to was the heirship to the Earldom, and that was only for the purpose of qualifying what if it had been realty would have vested the fee simple in him. It appears to me I cannot attribute any different meaning to the term "successors" in this case, though possibly they might not be heirs of the sixth Earl. There is nothing to indicate that the Earl and his successors were to take a different interest, and the case, therefore, falls within the principles which are stated by Lord *Hatherley* in the case of *Shelley* v. *Shelley* (1).

The next bequest is of the house in *Belgrave Square*. The testatrix employs the same language as that which is used with reference to the plate, with the addition of the words "and to be enjoyed with and to go with the title." Those words are not sufficient to create an executory trust, or, in my opinion, any executed trust or binding obligation affecting the sixth Earl, nor sufficient to cut down his interest to a life estate. In *Shelley* v. *Shelley* the gift was of jewellery to the testator's nephew *John*, "to go and be held as heirlooms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on, to the eldest son of his descendants, as far as the rules of law or equity will permit." Then there was a bequest which I need not refer to, as it has no bearing on this particular part of the codicil before me. The Vice-Chancellor held in substance that the words which I have read, if they had stood alone and unqualified by the subsequent direction, would have created an absolute interest in the nephew *John*. The present Lord Justice *Fry*, in the case of *In re Viscount Exmouth* (2), had before him a gift which was expressed in these words: "Upon trust to permit and suffer the same to go and be held and enjoyed with the title and honours of *Exmouth*, so far as the rules of law and equity will admit, by the person who for the time being shall be actually possessed of the said title, in the nature of heirlooms." Then there were subsequent clauses in that will which I do not refer to on the point now before me. The Lord Justice in giving judgment with reference to the clause I have

(1) Law Rep. 6 Eq. 540. (2) 23 Ch. D. 159.

read after having stated it, says (1): "There can, in my judgment, be no doubt that the effect of that clause, standing alone, would be to give an absolute interest in the chattels to the first person who succeeded to the honours, and that, therefore, if it had stood alone, the third Viscount would have become absolutely possessed of these chattels. That, I think, follows from the case of *Tollemache* v. *Earl of Coventry*" (2). In the case before me there is no limitation expressed with regard to the words and "to be enjoyed with." They are not qualified by any such expression as "so far as the rules of law and equity will permit," and would therefore, if construed as a direct gift or as an executed trust to the persons taking the title in succession, be void as an attempt to create a perpetuity. In *Montagu* v. *Lord Inchiquin* (3) there were such limiting words, namely, "so far as I lawfully can." The gift was in these terms: To *Lucius* Baron *Inchiquin* the family diamonds, and so forth, enumerating the particulars of the gift, "and I direct the said diamonds to be delivered to Lord *Inchiquin* free of duty, and I make the above bequest to Lord *Inchiquin* as head of the existing family, and so far as I lawfully can I direct that the said diamonds, &c., shall be deemed heirlooms in the family of *Inchiquin*, and shall be held and enjoyed by the person for the time being bearing the title of Baron *Inchiquin*." Vice-Chancellor *Hall* held that the gift did not lapse by the death of *Lucius O'Brien* Baron *Inchiquin* in the lifetime of the testatrix, that the clause was not executory, but that the direction created an obligation or trust which would have been binding upon *Lucius* Baron *Inchiquin* had he survived, and he also held that the disposition of chattels to follow a dignity would be good where, as he says, there is no rule against perpetuities transgressed. I understand that expression in his judgment to refer to the particular words I have mentioned, "so far as I lawfully can," and that as he construed the whole disposition to amount to a direct gift without any direction to settle, he considered that he was justified in putting that special construction on the words of the direction. But it appears to me that that case does not govern the one now

(1) 23 Ch. D. 162. (2) 2 Cl. & F. 611.
(3) 23 W. R. 592.

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before me, and that the words that I have referred to, "to be enjoyed with and to go with the title," are not sufficient to cut down, as I have already said, the absolute interest which the sixth Earl, as first taker, acquired. I therefore decide that the sixth Earl takes the plate and the house in *Belgrave Square* absolutely.

The third point is as to the collection. That is contained, as I have already intimated, in a gift to trustees, and there is a clear direction to settle—that they "shall, in the first place, select and set aside a collection of the best paintings, statuary, and china for the said Earl of *Essex* and his successors, to be held and settled as heirlooms, and to go with the title." Those words are, in my opinion, sufficient to create an executory trust, the objects of which are sufficiently expressed. Notwithstanding some expressions in Lord *Brougham's* speech in advising the House of Lords in *Tollemache* v. *Earl of Coventry* (1), I take it to be clear that a settlement may be made of chattels to accompany the devolution of a dignity within the limits allowed by law. The authorities referred to by Lord *St. Leonards* in his book on Property (2) sufficiently establish that proposition, and it is unnecessary for me to refer to them in detail, or to any of the subsequent authorities, which include the well-known case of *Sackville-West* v. *Viscount Holmesdale* (3). The omission of the words "so far as the rules of law and equity will permit," in this direction to settle, is, to my mind, immaterial, for in making the settlement the Court will so frame and mould the limitations as not to infringe the law against perpetuities. Here the testatrix was not, to use the language used in these cases, "her own conveyancer." All she does is to make a mere note as to the nature of the settlement, but, as I have already stated, in terms to my mind sufficient to shew who are to be the objects of the trust. In the case of the *Countess of Harrington* v. *Earl of Harrington* (4), Lord *Hatherley* says (5), "The difficulty upon that part of the case is simply this, that you cannot look on a bequest of this kind as an executory bequest, and take upon yourself to model

(1) 2 Cl. & F. 611.
(2) Page 330.
(3) Law Rep. 4 H. L. 543.
(4) Ibid. 5 H. L. 87.
(5) Law Rep. 5 H. L. 100.

the gift so as, by virtue of a modelling of the will, to give it full effect and validity." That is an expression of his opinion that in a gift similar to the one now before me the Court can mould the gift, and Lord *Westbury's* language is to the same effect when he states the rule in *Sackville-West* v. *Viscount Holmesdale* (1): "In construing the words creating an executory trust, a Court of Equity exercises a large authority in subordinating the language to the intent." Then he mentions certain particular cases, and deals with the case they had before them, which was where alienable hereditaments were attempted to be annexed to an inalienable barony, and he says (2), "It is plain, from the whole of the codicil, that the general and leading intent of the testatrix was to make provision for the support and maintenance of the dignity; and it would be mere mockery of this intent and purpose if the estates were settled so that they would at once become the absolute property of *Reginald* to the disherison of all subsequent possessors of the dignity under the letters patent." Lord *Cairns* speaks very much to the same effect, and says, in substance (3), that if the Court gave the property in that case to the person who was at the time the holder of the dignity which was limited for an estate tail, it would be, in his opinion, "adhering, indeed, to the letter, but would be wholly violating the spirit of the trust it was proposing to execute. In the present case, a settlement servilely following the words of limitation of the peerage would, in place of attaching the property as a provision for the peerage, constitute the second son of Lady *De la Warr*, as regards power of disposition, absolute owner of the property after the death of his mother." It appears to me, therefore, that I ought not to read this direction to settle as a direction which would in substance give the property in these chattels to the sixth Earl, and therefore I consider that this collection must be properly settled.

The terms of the settlement have not been very fully discussed at the bar. Under such a settlement the sixth Earl would be entitled clearly to enjoy the chattels during his life, and Lord *Capell*, who is his eldest grandson, who was living at the death of

(1) Law Rep. 4 H. L. 543, 565. (2) Law Rep. 4 H. L. 569.
(3) Law Rep. 4 H. L. 574.

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the testatrix, would be also entitled, on his succeeding to the dignity, to enjoy the chattels during his life. I am not sure it will be convenient for me at the present moment to go further than that, because I have not had the parties before me. I am quite ready to express my opinion in general terms with reference to the mode in which the settlement ought to be executed, but probably it is safer to direct a settlement, and in settling the draft settlement the proper parties must have notice. The whole matter can be better dealt with when the parties are before me in Chambers.

One point remains, and that is as to the furniture. That is not made part of the direction to settle. The language is, "I authorize them (the trustees) to give to the said Earl of *Essex*, or his successors, any articles of furniture which they shall think fit." The person to whom the trustees may think fit to make such a gift is, in my opinion, entitled absolutely. The testatrix was probably aware of the inconvenience there is in settling furniture which gets worn out by user, and is not of the same permanent nature as paintings, statuary, and china. Of course the trustees will not attempt to make any gift which might infringe the rule as to perpetuities, and probably they will be advised to make up their minds now as to what part of the furniture they intend to dispose of by way of gift, and to give it to the sixth Earl, because it would not be competent for them at the present moment to make a gift to any person except him. Whatever they do not dispose of by way of gift falls clearly into the residuary estate.

Macnaghten, Q.C., and *Rowden*, upon the point raised by question 5 of the special case:—

The box of jewellery was sent to the bankers for safe custody only, when the testatrix was not in *Belgrave Square*, and we submit it formed part of the contents of the house and passed to us under the gift of the residue: *Chapman* v. *Hart* (1); *Land* v. *Devaynes* (2); *Williams* on Executors (3).

Ince, Q.C., and *Levett*, for the residuary legatees:—

The box was not in the house at the time of the testatrix's

(1) 1 Ves. Sen. 271. (2) 4 Bro. C. C. 537. (3) 8th Ed. p. 1333.

death, and we contend that the words "contents of my house" mean contents in the strict sense of the term. If a testator gives all the property in a particular house or spot, by taking away the property the gift is adeemed: *Spencer* v. *Spencer* (1); *Heseltine* v. *Heseltine* (2).

CHITTY, J.:—

The question is whether a box of jewellery consisting of personal ornaments, which had belonged to the late Countess of *Essex*, and was at the time of the execution of Miss *Johnston's* codicil in her house in *Belgrave Square*, but at the time of her death was at her bankers, passed under the bequest in the codicil, which was as follows:—

"As to all the household furniture, paintings, pictures, books, china, and the whole contents of my said house, No. 9, *Belgrave Square* aforesaid, I bequeath the same to my said trustees and executors." It is admitted, and indeed could not have been contested, that if the box of jewellery had been at the house at the time when the testatrix died it must have passed under these words. The subsequent words are these: "I bequeath the same to my said trustees and executors and to the survivors or survivor of them upon trust that they do and shall, in the first place, select and set aside a collection of the best paintings, statuary, and china for the said Earl of *Essex* and his successors to be held and settled as heirlooms, and to go with the title, and I authorize them to give to the said Earl of *Essex*, or his successors, any articles of furniture if they shall think fit; and as to all the rest and residue of the contents of my said house upon trust for my trustees and executors to select presents for any of my late dear aunt *Catherine* Countess of *Essex* and my own dear friends, and to present them as a remembrance of us." It is plain that if the box and the contents pass the residuary legatees will be entitled to so much of the jewellery as the trustees may not think fit to dispose of under that discretionary power of making presents which is given to them at the clause I have read. It is observable that in the gift the word "jewellery" does not occur

(1) 21 Beav. 548.

(2) 3 Madd. 276.

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from beginning to end of the clause, but it does appear to me that the most appropriate presents which trustees could select for the dear friends of the late Countess and of the testatrix would be articles of jewellery; articles of jewellery which had belonged to the late Countess herself, because it is clear that all the jewellery now the subject-matter of contest was derived from the late Countess.

The facts appear to be these: The testatrix had lived for some considerable time before the death of the Countess with her in the house at *Belgrave Square*, and the practice of the Countess appears to have been to send this box from time to time to her bankers and to receive it back from them, and as a mere matter of inference from the facts thus shewn, I hold that the jewels which according to the statement in the special case were, so far as locality is concerned, always at the house or at the bankers, were delivered to the bankers for safe custody and for safe custody only. That, I say, to my mind, is the true inference to be drawn from the facts.

The Countess died on the 22nd of February, 1882, and on that very day the box was removed from her bankers and sent to *Belgrave Square*. Probably that was done—I have no evidence one way or the other on the point—but I should rather draw the inference that it was done at the request of the Countess, a request made probably before the 22nd of February, seeing that she died on that day, and I think it very improbable that Miss *Johnston* would on the day after the Countess's death have sent for the jewels. If she did send for them it would be rather in the character of companion to the Countess than as asserting her own right before the will had been proved, in fact under the will they would pass to the executors of the Countess, and the will of course had not been proved on the day of her death. Then it is not stated on the case, but an affidavit on the part of those who are competent to speak will be produced to shew that the testatrix, Miss *Johnston*, left town about the 4th of October, 1882, to go to *Southsea*, and that she returned from *Southsea* in the November following, being ill, perhaps not a serious illness but still being ill, and she was at that time a lady of eighty years of age or thereabouts, and she died very soon afterwards, namely, in the

month of December, 1882. I hold as a fact, from what appears to me to be the natural inference, that Miss *Johnston* after the death of the Countess also sent the box of jewels merely for the purpose of safe custody to the bankers. As I have said the special case shews that so far as locality is concerned the jewellery was always either at *Belgrave Square* or else at her bankers. Probably there was no strong room in *Belgrave Square*, and whether there was or not, it is the common practice, which as an ordinary man of the world I know, to send valuable articles to bankers for safe custody when the family is out of town.

Now the case certainly does present this feature. Jewellery is not appropriate to a house in any sense. Jewellery is merely for personal use and for personal ornament, and the gift is a gift of things described by locality only, but I find that the locality to which the goods ought to be ascribed is the house at *Belgrave Square*, and that they were removed when they were removed from *Belgrave Square* merely for the temporary purpose I have described, namely, preservation; and it seems to me that additional light is thrown on the nature of this bequest from the power which is given to the trustees and executors to make the selection of presents for the friends of the late Countess and of the testatrix.

I think therefore that I shall be only giving effect to the intention of the testatrix, as fairly derived from the words which she has used, by holding, as I do, that this box and the contents pass as part of the contents of the house.

Now the executors can of course, in the exercise of their discretion, make presents, if they see fit, of the jewellery to the relations of Miss *Johnston*, who are her residuary legatees. As I have said already, so far as they do not dispose of the jewels under this discretionary power, the residuary legatees will take them. They can take them in another way, that is by independent gift from the hands of the executors. The result of the cases, which I certainly do not propose to go through, appears to me to be fairly stated in Mr. Justice *Williams'* book on Executors (1). No ademption by removal it would seem will take place where the goods are removed for their preservation. The

(1) 8th Ed. p. 1333.

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illustration that he gives is to save them from fire, and that is an illustration taken from the case of *Chapman* v. *Hart* (1), where Lord *Hardwicke*, in speaking of a gift of this class, laid down the law in that way. The illustration is, so as to save them from fire. But the proposition expressed in larger terms is for preservation, and I think if the goods are appropriated to the house, that is to say belonging to it, as furniture or the like, and are only removed for the purpose of repair, it is quite plain they would pass. That last consideration does not apply to the case before me. The case before me I think depends on this—that the usual locality of the goods in question was the house, and they were only removed for a temporary purpose. It is a very significant fact that the goods were in the house at the time the lady made her will.

Macnaghten, Q.C., and *Rowden*, for the executors on the point raised by question 6 of the special case:—

All the bequests, whether pecuniary or specific, are intended to be free of legacy duty. The term "legacy" has been held to include a gift of stock: *Ansley* v. *Cotton* (2); *Hanson* on Probate, Legacy, and Succession Duties (3).

Ince, Q.C., and *Levett*, for the residuary legatees:—

The word "legacies" must be held to mean only pecuniary legacies. In *Douglas* v. *Congreve* (4) it was held that a legacy of stock was not a pecuniary legacy and consequently not exempted under a clause in a will directing the payment of duty on all pecuniary legacies from the payment of such duty.

CHITTY, J.:—

The point I have now to decide is whether under the direction contained in the second codicil, which is as follows: "I direct all the legacies left by my will and codicil to be paid free of legacy duty," succession duty which is payable in respect of the leasehold house is to be paid out of the general estate, or whether the succession duty is to be borne by the legatees. It is quite plain,

(1) 1 Ves. Sen. 271, 273.
(2) 16 L. J. (Ch.) 55.
(3) 3rd Ed. p. 95.
(4) 1 Keen, 410.

having regard to the 19th section of the Succession Duty Act, that the duty payable in respect of the leasehold house is succession duty and not legacy duty. That was the law when the will was executed, and when it came into operation. Legacy duty is payable once for all. Succession duty is essentially different in its nature, and I think I should be straining words far beyond what I should be warranted in doing if I were to hold that in this codicil legacy duty included succession duty.

I am clear it does not.

The next point is one which is not quite so simple. The testatrix, as I have said directs, that all the legacies left by her will and codicils are to paid free of legacy duty, the question is whether that clause does or does not include a bequest of plate and certain valuable articles which were to go as heirlooms, and also certain other specific bequests which are given particularly by this codicil and by a subsequent codicil. The testatrix had derived all or the bulk of her property from the Countess of *Essex*, and the more important specific bequests are in favour of the present Earl of *Essex*, and to some extent a restoration by the testatrix of the property which she derived from the *Essex* family to the *Essex* family. That is but a slight circumstance, and one upon which I should certainly not proceed upon by itself in giving judgment. She had by the previous codicil made a bequest of certain stock legacies, but those are revoked, and the only legacy which is given and remains unrevoked by her subsequent instruments is a pecuniary legacy which is given to the executors under the first codicil, which contains a direction that those legacies, 200*l.* a piece, are to be given free of legacy duty.

Now the second codicil, which contains the direction and is the most important one, does give several pecuniary legacies, and by another codicil, not stated in the case, there are also several pecuniary legacies given. But the second codicil contains, besides, the important gifts of the plate, and the collection, which I call for shortness the heirlooms, this direction, "as to all the rest and residue of the contents of my said house, upon trust for my trustees and executors to select presents for any of my late dear aunt *Catherine* Countess of *Essex* and my own dear friends, and to present them as a remembrance of us," and after direction

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as to payment of duty there are gifts to the servants in this way: she thanks all her servants for their kindness and for the trouble they have taken in her late dear aunt's and in her affairs, and confers on her said executors the fullest powers of dealing with her servants who may be living with her at the time of her decease, and to present them with one or more years' wages, and any presents in money or otherwise, or both, as in their opinion, according to the nature of the services, may seem just and right.

The effect of the two parts of that codicil which I have last read is to enable the executors to make presents to friends of the testatrix and the friends of her aunt, and in remembrance of her, and also to make presents in kind and specie to all the servants as they may think fit. No doubt, as was observed, the executors under that last clause can make presents to the servants in money as well as in specie, and they could, on this question of the legacy duty, make the present, first, of an article, and, secondly, of a sufficient sum of money to pay the legacy duty on that article, and then the gift of the money would be a pecuniary legacy, and, according to every view, would fall within the direction to be paid free of legacy duty.

I have to consider whether I ought to give more effect to the words at the commencement of the direction, which are "all the legacies left by my will and codicils," than to the word "paid." The word "paid" of course primarily includes only the pecuniary legacies, but a specific legacy is just as much a legacy as any other legacy given by the will. In my opinion, particularly having regard to the authority I am about to mention, by which I am bound so far as it is applicable to the present case, the true construction of this codicil and this particular clause is that all the bequests, whether pecuniary or specific, are intended by this testatrix to be free from legacy duty. In regard to the presents which may be made, it seems to me that I should not be giving the true effect to her intention if I were to say that the legatees who were to take something in remembrance of her by way of present, being friends of the late Countess, from whom she derived all this property, were themselves to bear legacy duty. And the same observation applies, though not with quite the same force, with reference to the servants whom she thanks and

the presents which may be made to them, the word "paid" is not a word which is appropriate to specific legacies, but on construction it may, in a looser sense, be applied to the satisfaction or delivery of the specific legacies.

Now the case that I have referred to was one which came before Lord *Cottenham*, in which he reversed the decision of the Master of the Rolls: it is *Ansley* v. *Cotton* (1). There was in that case a gift of an annuity, and of course it was necessary that a sum should be appropriated to answer it, and then the residue was to be upon trust to appropriate a sum of £40,000 Consols, or purchase stock to that amount, and a similar direction with reference to a sum of £6000 stock. And then the testatrix continued in this way: "I give and bequeath to the several persons next hereinafter named, the several legacies following, that is to say," and then she gave pecuniary legacies, none of them being of large amount. Then came the words, "I hereby direct that all such several legacies, as well as any hereinafter given, shall be paid immediately after my decease, and free of legacy duty." The point in the case was whether the expression "all such several legacies," which seemed in point of language to coincide with the words which introduced the pecuniary legacies, namely, "the several legacies," was, on the true construction of the will, confined to the pecuniary legacies, or whether it did not include also the legacies of stock. The stock legacies were, as I have stated, either to be purchased or appropriated, and if there was sufficient stock they might have been appropriated, in which case the executors' duty would have been to deliver and not to pay. The Lord Chancellor says this (2): "The testatrix then bequeaths certain legacies, and then comes the expression on which the question turns;" and then he goes on, "It is an imperfect sentence, but to make it complete, it must be read, 'such legacies as are before given, as well as what are after given.'" That is what I have in express terms in this codicil—"all the legacies left by my will and codicil," and then he says, "it is clear that this is not confined to gifts of money legacies, because the annuity is admitted to be included." Although he says it "is admitted to be included" he must have

(1) 16 L. J. (Ch.) 55. (2) 16 L. J. (Ch.) 56.

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held it was included, because he would never have adopted as one of the grounds on which he proceeded in his judgment an admission made by counsel, unless he considered it to be an admission proper to be made. Then he goes on: "That was not to be excluded. Why then exclude the other case of a bequest of stock? I can see nothing to distinguish the one from the other, except the small circumstance of a fresh sentence being begun with the words 'I give and bequeath to my several servants next hereinafter mentioned the several legacies following.'" Then he deals with the special circumstances of that will, namely, that the stock legacies were either to be appropriated or to be purchased. But having dealt with that, and said in substance that that did throw some light upon the question, he, at the end of his judgment, states in express terms that he does not proceed upon that, "but upon the sentence which directs the payment of the legacy duty." It appears to me, although I agree it is one of construction by which I am not absolutely bound, that the decision in that case is appropriate to the case I have to decide, and I think I am giving the true effect to the intention of this testatrix when I say that the phrase "all the legacies left by my will and codicils," includes the specific legacies. The effect of the words "to be paid" are not sufficient to cut down that gift. Of course I take the sentence as a whole, and read it fairly, and I am satisfied that what I am doing is what the testatrix herself meant, and I think she has said it with sufficient distinctness.

Solicitors: *John Hassard; Fladgate, Smith & Fladgate; Roopers & Whately; Charles E. Baker.*

G. M.

ALLHUSEN *v.* BROOKING.

CHITTY, J.

1884

March 7, 14.

[1884 A. 70.]

Landlord and Tenant—Ground Game Act, 1880 (43 & 44 *Vict. c.* 47)—*Agreement for Lease.*

When at the date of the passing of the *Ground Game Act*, 1880, land is in the occupation of a tenant with a legal interest, as tenant from year to year, expiring after the commencement of the Act, but also with an equitable interest under an agreement prior to the Act for a lease for fourteen years, to commence from the expiration of the legal interest, and reserving to the landlord the right to the ground game on the land, such right in the landlord as against the tenant is preserved by the provisions of the saving clause of the Act (sect. 5): the phrase "is vested" not being confined to an actual legal vesting under a lease in possession, but including an equitable vesting of the right under an agreement for a lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration.

MOTION that Defendant might be restrained from using or authorizing any person to use a gun or firearms for the purpose of killing game on the *Vicarage Farm, Stoke Pogis* (of which the Plaintiff was the owner in fee, and the Defendant the occupier), and from killing or taking, or authorizing or permitting to be killed or taken, hares on such land, and from killing, or authorizing, or permitting to be killed with guns or firearms rabbits on such land, and from neglecting to preserve all game upon, and from interfering with the Plaintiff's exclusive right of shooting over the land.

By agreement of the 7th of August, 1876, the Plaintiff agreed to let the *Vicarage Farm* to a Mr. *Hales*, at the yearly rent of £540 upon, so far as was material, the following terms and conditions:—

"The tenancy to be for three years, commencing from the 29th of September, 1875, and shall not be determinable by either party without a two years' notice to quit" (except as to a part which should be determinable by the Plaintiff at six months' notice to quit at any Michaelmas, should he give up such land). "The tenant shall preserve all game, and shall not use a gun or allow any person to sport without the landlord's permission, and

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shall sign all such notices not to trespass as may be required by the landlord or his agent. The landlord to have the exclusive right of shooting, and the tenant to be allowed to kill rabbits otherwise than by the use of a gun. The tenant shall not assign, underlet, or part with the possession of the premises, or any part thereof, without the consent in writing of the landlord or his agent; if sublet, notwithstanding that condition, the lease to be forfeited. The landlord reserves to himself out of this letting all timber, &c., and also all game (except rabbits, as hereinbefore mentioned), woodcocks, snipe, hares, wildfowl, and fish, with liberty for the landlord, his friends and appointees, to enter at all times to take and protect the same, and to sport upon the premises at pleasure."

On the 13th of February, 1880, a fresh memorandum of agreement was signed between the Plaintiff and *Hales*, by which it was agreed that the existing contract of the 7th of August, 1876, should be altered in certain particulars, and (by clause 3) that "from and after the 29th of September, 1881, the rent now payable by the tenant shall be reduced to £500 per annum, the landlord paying tithes as heretofore." (4.) "That subject to the rent being paid quarterly with regularity, the landlord agrees to the tenant keeping possession of the lands and premises now held by him, and agreed to be held under that agreement for a period of fourteen years, to commence on the 29th of September, 1881."

In December, 1880, the Plaintiff sent to *Hales* a written consent to his "assigning the agreements, dated the 7th of August, 1876, and the 13th of February, 1880, made between you and myself, for letting and taking the *Vicarage Farm*, to Miss *S. A. Brooking* (the Defendant), for the residue of your term and interest in such agreements."

On the 31st of December, 1880, Miss *Brooking*, the Defendant, signed and sent to the Plaintiff the following document: "In consideration of your granting a license for the transfer from Mr. *Thomas Hales* to myself of the agreements dated the 7th of August, 1876, and the 13th of February, 1880, for letting the *Vicarage Farm*, I hereby agree to pay the rent and to abide by, perform, and observe all the agreements, conditions, and stipulations

contained in the said agreements, and which on the part of Mr. *Thomas Hales* are from this time to be paid, observed, and performed, in the same manner as if I had been a party to the said agreements in the place of Mr. *Thomas Hales*."

Under this agreement the Defendant had entered into possession of the farm. In July, 1883, her nephew, who resided with her at the farm and managed it, shot two hares, and, on being summoned before the magistrates, produced the Defendant's written authority under the *Ground Game Act*, 1880, whereupon the magistrates held that they had no jurisdiction, and dismissed the summons. Further disputes arose between the Plaintiff and Defendant, who claimed compensation for injury to her crops by the ground game, and asserted that she was not bound by the provisions of the agreement of the 7th of August, 1876, as regarded ground game, and that she was entitled duly to authorize a person to kill hares and rabbits on the farm with firearms under the *Ground Game Act*, 1880 (43 & 44 Vict. c. 47), which received the royal assent on the 7th of September, 1880. The Defendant had also, it was alleged, neglected to preserve the game, and refused to execute a lease of the farm when tendered to her by the Plaintiff. In these circumstances the Plaintiff had brought an action for specific performance of the agreements of August, 1876, the 13th of February, 1880, and the 31st of December, 1880, and for an injunction in the terms above stated.

Merewether, Q.C., and *Benjamin Eyre*, for the Plaintiff, in support of the motion, relied upon sect. 5 of the *Ground Game Act*, as expressly excepting from the operation of the Act, until the determination of the contract, any case where, as here, the right to kill and take ground game on the land "is vested by lease, contract of tenancy, or other contract made for valuable consideration," in some person other than the occupier. Before the *Judicature Act*, the agreement of February, 1880 to grant a fourteen years' lease, though not under seal, and therefore void at law under 8 & 9 Vict. c. 106, s. 3, could have been specifically enforced in equity: *Parker* v. *Taswell* (1); and the Defendant now holds under the same terms in equity as if a lease had been

(1) 2 De G. & J. 559.

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granted, and cannot complain of the exercise by the Plaintiff of the same rights as the Plaintiff would have had if a lease had been granted: *Walsh* v. *Lonsdale* (1). And the Defendant, who has occupied the property under the terms of the agreements of 1876 and 1880, is not released from the stipulations contained in those agreements by the fact that she has not acquired a vested right in the term by the instrument under which it is being enjoyed: *Martin* v. *Smith* (2); *Adams* v. *Clutterbuck* (3). Having regard to the two years' notice to quit stipulated for by the agreement of 1876, it cannot be contended that the Defendant is in the position of mere yearly tenant: *Tooker* v. *Smith* (4).

Ince, Q.C., and *Moulton*, for the Defendant:—

Unless there is some special agreement antecedent to the passing of the Act, which has the effect of depriving the tenant of the right given to him by the Act, we are entitled to shoot hares and rabbits with a gun. We say that no such agreement, nor anything to deprive the Defendant of her right, can be shewn. She is in occupation of the land as tenant from year to year only.

The agreement of February, 1880, does not bind the tenant to take a lease for fourteen years, but merely binds the landlord not to disturb the tenant in possession of the land so long as the rent is regularly paid. By the agreement of 1876 the occupier was, after 1878, in the position of a tenant under an agreement for a term which has expired, that is a legal tenant from year to year, and until the execution of a lease there has been nothing to alter that position; and if that was the position of things at the time of passing the Act the Defendant cannot be, by anything that may afterwards arise, deprived of the benefits given to her by the Act. Assuming that the agreement of February, 1880, had the effect of creating a term binding in equity as between both parties, the term thereby vested was not to commence until the 29th of September, 1881, and a right to arise under an agreement which does not take effect until after the commencement of the Act is not a right *in esse* under sect. 5, which applies only when "at the date of the passing of this Act,

(1) 21 Ch. D. 9.
(2) Law Rep. 9 Ex. 50.
(3) 10 Q. B. D. 403.
(4) 1 H. & N. 732.

the right to kill, &c., is vested, &c.", so as to exclude the operation of the Act. By adopting the Plaintiff's construction the Act might be continually evaded by granting leases renewable from time to time, and reserving to the landlord the right to shoot ground game.

Merewether, in reply, cited *Cowen* v. *Phillips* (1).

CHITTY, J.:—

This case, though on motion only, has been argued at some length, and it appears to me that the only real difficulty arises from the informal character of the documents which have been signed. As at present advised I do not find any difficulty in the construction of the Act of Parliament. [His Lordship, after stating the agreement of August, 1876, proceeded:—] The case does not rest, however, on that agreement. There is another agreement signed by Mr. *Hales* and Mr. *Allhusen*, dated the 13th of February, 1880, and that agreement came into operation of course before the 7th of September, 1880 (the date of passing of the *Ground Game Act*, 1880). It is admitted at the bar that the present Defendant, who is the assignee of Mr. *Hales*, is for all purposes of the present motion, and indeed for the purposes of the action, in the same position as Mr. *Hales* would have been, and no distinction has been attempted in argument between the position of the present Defendant and Mr. *Hales* himself. Now the agreement of the 13th of February, 1880, requires some careful examination, but before proceeding to examine it I will state this, that in my opinion, if there had been an agreement for a lease, say for ten or fourteen years, which was in existence at the date of the passing of the *Ground Game Act*, and that contained such a stipulation as is contained in the agreement of August, 1876, I should entertain no doubt whatever that the Court in decreeing specific performance afterwards of that agreement, and clothing that which was a mere equitable title with the legal title, would have directed the deed to be so drawn as to include the stipulation in regard to the rabbits and ground game; and I think that that is the only fair construction to be put upon sect. 5.

(1) 33 Beav. 18.

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The *Ground Game Act* begins with a section the effect of which is to confer the right at once on the tenant to kill and take ground game, and then sect. 3 contains a provision which avoids every agreement purporting to defeat and alienate the right of the occupier. *Primâ facie*, sect. 3 would be prospective only, that being the general rule of construction of Acts of Parliament, that you are not to interfere with rights unless you find express words, and the operation of that 3rd section would be prospective only. But the case does not rest there, because sect. 5 does contain an express saving clause, and it is really on sect. 5 that the question remains to be decided. The words are:—"Where at the date of the passing of this Act the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this Act, until the determination of that contract, to kill and take ground game on such land." Then there is a clause in relation to Scotland which is generally similar in its provisions. In my opinion, in the case I am assuming, viz. of there being a good equitable agreement for a lease existing at the date of the Act and the tenant being in possession under that agreement, and there being a reservation of the ground game to the landlord, or some reservation in relation to the ground game in favour of the landlord, sect. 5 would have applied, and the landlord's exclusive right to kill, which would have been vested in him equitably if not legally, would have been preserved to him by sect. 5. That being my general opinion, I have to look at this agreement of February, 1880, with some care, and it is upon this agreement that the question appears to me mainly to turn. It is a memorandum of agreement signed by both parties, and in construing a document of this kind the Court must read every part of it and collect the intention of the parties, not from one clause only but from all the clauses fairly put together. The argument for the Defendant on the 4th clause is a very singular one, and it struck me as such when it was first presented to the Court. It is that the Defendant has not here agreed to take a fourteen years' lease; and no doubt the language is defective, the stipulation being that the landlord agrees, but there is no stipulation that the tenant agrees. But

the stipulation on the part of the landlord is very remarkable in its phraseology, because it agrees that the tenant do keep possession, and it looks, on the face of it, as if the tenant agrees that he should take possession. Then the description of the lands is, "the lands now held and agreed to be held under this agreement." I quite accede to the argument that the words "agreed to be held under this agreement" might be a mere description of parcels and nothing else; but I think, on the fair construction of this agreement, that this is not the fair meaning. Having regard to the whole agreement it appears to me that this is an agreement on the part of the tenant to take the land for fourteen years. If that is so the interest of the tenant at the time the Act came into operation was that he had a legal interest as tenant from year to year, which did not expire until the 29th of September, 1881, which is after the Act came into operation. But he had, in addition to this, an equitable term which commenced from the date I have mentioned, from the 29th of September, 1881, and ran for fourteen years from that time. I will stay for a moment to say that it is quite plain that the stipulations of the original contract, except so far as they are expressly varied by the contract of the 13th of February, 1880, formed part of the terms on which possession of the land is to be held for the additional term of fourteen years; and therefore the clause as to shooting rabbits, and the other clause to which I referred, are incorporated and would form part of the lease that would have to be granted. The position of the parties therefore was this, that there was no doubt a legal reversion in the landlord in respect of the tenancy which was current and would not expire till the 29th of September, 1881. But in addition to that, there was vested in him a reversion in equity and vested in the tenant a lease in equity commencing from the expiration of that legal tenancy. In regard to the operation of the equitable lease the Court of Appeal has expressed its judgment in *Walsh* v. *Lonsdale* (1). The Master of the Rolls in giving judgment, which of course is binding upon me, says (2): "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates,

(1) 21 Ch. D. 9. (2) 21 Ch. D. 14.

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as there were formerly. . . . That being so he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted." That being so, ought I, for the purpose of applying sect. 5, to sever the landlord's right in this case into two parts, and say that the right to kill ground game was reserved to him legally in respect of his reversion of the tenancy, which was then current, being a legal tenancy, and that he has split that from the equitable reversion which he had in respect of the agreement to grant the fourteen years' lease; and having split it ought I then to say that sect. 5, which speaks of the right to kill being vested, does not apply to this case so far as relates to the reversion in equity which was vested in the landlord? The phrase "is vested" does not mean simply that it is vested in possession, or else that would have been the language of the section, but includes the right which was equitably vested. To take the language of the Act, I would say that at the time of the passing of the Act the right to kill ground game was equitably vested by a lease, if you will, for it is immaterial that it is an equitable lease only. But assuming for the moment that lease here means legal lease, then I say the case falls certainly within the larger words, "contract of tenancy or other contract *bonâ fide* made for valuable consideration." It appears to me therefore that the saving clause in sect. 5 does apply to the present case and that the tenant is not entitled to kill game contrary to the stipulations I have read. The Legislature does not take away vested rights except with some compensation. When, as here, the rent was reduced by the second agreement from £540 to £500 per annum, with some other alterations which were made, that was the rent the parties agreed to as the fair rent, having regard to all the stipulations, one of which was that the tenant should not use the gun in killing ground game. It appears to me I ought not to strain the statute for the purpose of destroying the contract between the parties. Sitting here I would give full effect, and am satisfied that by my judgment I am giving full effect, to all the stipulations of the Act. It prevented contracts from being made contrary to the terms of the Act which vested the inalienable right to kill the ground game in the tenant in future. But I am dealing with a case which was

not a future case, but with a case in which there was a present right, in my opinion, vested in the landlord at the time the Act passed by an agreement *bonâ fide* made for valuable consideration. The Plaintiff, therefore is entitled to an order.

The order as made was to restrain the Defendant from using or authorizing any person to use a gun or firearms for the purpose of killing game on the premises, &c., and from killing or authorizing to be killed hares on the land or premises, and from killing with a gun rabbits on the same land.

Solicitors: *G. L. P. Eyre & Co.*, for *Long, Durnford, & Lovegrove, Windsor; Drake, Son, & Parton.*

F. G. A. W.

ALDERSON *v.* ELGEY.

[1880 A. 654.]

Mortgage—Mortgagor—Mortgagee—Right of Mortgagor to call for Assignment to any third Person—"On the terms"—Redemption—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 15.

A tenant for life of mortgaged premises who has failed to keep down the interest and who has obtained the usual order permitting him to redeem the mortgage, is not of right entitled under sect. 15 of the *Conveyancing and Law of Property Act*, 1881, to require the mortgagee to transfer the mortgage debt and premises to a third person.

AT the date of the indenture of mortgage hereinafter mentioned the hereditaments comprised therein stood limited by virtue of an indenture of settlement dated the 12th of March, 1861, to such uses as *Margaret Elgey* should by deed or will appoint.

By an indenture dated the 11th of November, 1874, and by certain other instruments of further charge, the hereditaments comprised in the indenture of settlement were charged by *John Elgey* and *Margaret* his wife, by way of mortgage, with the payment to *William Alderson* in the whole of the sum of £1300 and interest.

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William Alderson died in December, 1878, having by his will appointed the Plaintiffs his executors.

Margaret Elgey died in January, 1877, having by her will given all her real estate to the Defendant *John Elgey* for life, with remainder, as to part, to the Defendant *J. R. Elgey* and his heirs, and as to the other part to *Sarah Elgey*. This latter part of the property was afterwards purchased by the Defendant *William Waterson*.

On the 30th of July, 1881, the Plaintiffs obtained the usual foreclosure decree in this action, and by the certificate dated the 10th of June, 1882, it was found that there was due to the Plaintiffs for principal, interest, and costs, the sum of £1808, which included the sum of £351, being the arrears of interest due on the mortgage debt for the period between the death of *Margaret Elgey* and the date of the certificate, and the 11th of December, 1882, was fixed as the day for payment.

By an indenture dated the 27th of December, 1882, between the Plaintiffs of the one part, and the Defendant *William Waterson* of the other part, the Plaintiffs' mortgage was transferred to the Defendant *William Waterson*.

By an order dated the 27th of July, 1883, it was ordered that an account should be taken of what was due to the Defendant *William Waterson* for interest since the 10th of June, 1882, upon the principal sum secured by the mortgage and further charges transferred to him by the indenture of the 27th of December, 1882, and for costs, and that upon the Defendant *John Elgey*, as tenant for life, paying to the Defendant *Waterson* the sum of £1808, together with what should be found due for interest subsequent to the 10th of June, 1882, and costs, the Defendant *William Waterson* should reconvey to the Defendant *John Elgey* the hereditaments comprised in the mortgage free and clear from all incumbrances, and in default that the said *John Elgey* should stand absolutely debarred and foreclosed of and from all equity of redemption in the mortgaged premises, and it was declared that in the event of the mortgaged premises being so redeemed by *John Elgey* they were to be held by him upon trusts corresponding with the uses and limitations declared and limited concerning the same by the settlement dated the 12th of March, 1861, and

any appointment made in exercise of the powers therein contained; and further, that in the event of the mortgaged premises being redeemed by *John Elgey*, he would, on his death, be entitled to a charge thereon for the amount of principal, interest, and costs which he should so pay in redemption of the hereditaments, after deducting the arrears of interest, which accrued between the death of *Margaret Elgey*, and the 10th of June, 1882, which arrears he was as tenant for life of the premises liable to keep down. The certificate found there was due for interest and costs subsequently to the 10th of June, 1882, the sum of £196 2*s.* 2*d.*, and fixed the 7th of February, 1884, as the time for payment thereof and of the sum of £1808.

This was a motion on behalf of *John Elgey*, that on payment to the Defendant *William Waterson* of the sums payable to him under the order dated the 27th of July, 1883, and the certificate, he might be ordered to transfer and assign the mortgage debt, and convey the mortgaged hereditaments and premises to such person as *John Elgey* might direct, and in the meantime that no order for foreclosure absolute should be applied for by or on behalf of *William Waterson* without notice to *John Elgey*.

Macnaghten, Q.C., and *H. Burton Buckley*, in support of the motion.

This motion raises a question under sect. 15 of the *Conveyancing and Law of Property Act*, 1881. That section is as follows: "Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly."

The Defendant *John Elgey* is the person entitled to redeem, and his right is one solely under the statute, and there is nothing in the foreclosure order to deprive him of that right.

If the mortgagee gets his money it cannot matter to him whether he reconveys to *John Elgey* or transfers the mortgage debt and premises to his nominee.

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ALDERSON v. ELGEY.

Ince, Q.C., and *G. Williamson*, for *Waterson*:—

The mortgagor in this case cannot require the mortgagee to transfer as he desires.

John Elgey is tenant for life, and by the order of the 27th of July, 1883, it was declared that if the mortgaged premises were redeemed by him they were to be held by him upon trusts corresponding with the uses and limitations declared and limited by the settlement of the 12th of March, 1861.

There is no absolute right in the mortgagor under the statute to demand a transfer: *Teevan* v. *Smith* (1).

Macnaghten, in reply:—

The 12th section of the *Conveyancing Act*, 1882, was passed for the express purpose of getting over the decision in *Teevan* v. *Smith*.

The word "terms" in sect. 15 of the Act of 1881 mean on payment to the mortgagee of what is right. We submit that we are within that section.

CHITTY, J.:—

This is a motion on behalf of the Defendant *Elgey* that on payment to the Defendant *Waterson* of the sums payable to him under the order dated the 27th of July, 1883, and the certificate, he might be ordered to transfer and assign the mortgage debt and convey the mortgaged hereditaments and premises to such person as *John Elgey* might direct, and in the meantime that no order for foreclosure absolute should be applied for by or on behalf of *William Waterson* without notice to *John Elgey*.

The position of the parties is this. *Waterson* has taken a transfer from the late Plaintiffs, the two *Aldersons*, of a mortgage, and he has obtained a foreclosure decree. The mortgage was a mortgage paramount to a settlement. It was made under a power vested in the same persons as created the settlement, who had a general power of appointment, the mortgage was first created by deed, and then a settlement was made by will. The mortgage therefore is prior to the settlement.

(1) 20 Ch. D. 724.

The title to the equity of redemption is this. *Waterson* is the remainderman of a part of the property, and *John Elgey* is tenant for life of the whole, and the order, which I propose to refer to a little more in detail in a moment, was made on the 27th of July, 1883, and the Chief Clerk's certificate has been filed under that order. There is the large sum of £351 due for arrears of interest, which *John Elgey*, as tenant for life, ought, as between himself and the remainderman, to have kept down. Mr. *Waterson*, who obtained the order, is, as I have said, the remainderman as to part of the land, and the order is in substance this: first, an account is directed of what is due to *Waterson* for interest since the 10th of June, 1882, upon the principal sums secured by the mortgage and further charges mentioned in the deed of the 27th of December, 1882, and for the subsequent costs of the action; there had been a certificate ascertaining the amount of principal and interest up to the date mentioned; and then the order goes on that upon *Elgey*, as tenant for life, paying to *Waterson* the sums by the certificate of the 10th of June, 1882, certified to be due, making together £1800 odd, together with what should be certified to be due to *Waterson* for interest and costs under the account within fourteen days after the date of the Chief Clerk's certificate, *Waterson* is to reconvey to *Elgey* the property comprised in the mortgage free from incumbrances by *Waterson*, but in default *Elgey* is to be foreclosed. Then comes this declaration: "The Court doth declare that in the event of the mortgaged premises being so redeemed by *John Elgey*, they are to be held by him upon trusts corresponding to the uses and limitations declared and limited concerning the same by the settlement," and then, "that in the event of the mortgaged premises being so redeemed by *John Elgey*, he will on his death be entitled to a charge on the mortgaged premises for the amount of principal, interest, and costs which he shall so pay in redemption of the hereditaments, and of his costs of and incident to the application after deducting £351, being the arrears of interest by the Chief Clerk's certificate found due on the aforesaid mortgage debts, for the period between the death of *Margaret Elgey* and the date of the certificate, which

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arrears *John Elgey*, as tenant for life of the mortgaged premises, was liable to keep down."

After that order *John Elgey* comes and asks for an order that *Waterson* should transfer the mortgage simply to the nominee of *John Elgey*, and the question is whether *Elgey* is entitled to the order.

The motion is based upon the 15th section of the *Conveyancing Act* of 1881, which enacts that "where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs." As was pointed out in the judgment of the Court of Appeal in the case of *Teevan* v. *Smith* (1), the transfer is to be instead of a reconveyance, and the transfer is to be on the terms on which the mortgagee would be bound to reconvey. Now, it is clear on the face of the order of the 27th of July, 1883, that the terms on which the reconveyance was to be made are, first, a conveyance of the legal estate in fee simple to *John Elgey*, but *John Elgey* when he has so obtained a reconveyance is declared a trustee upon trusts corresponding with the uses and limitations declared by the settlement. *John Elgey's* right to stand as mortgagee in reference to the inheritance is limited specially to the principal and the costs, but he has as against the inheritance of course no charge given to him in respect of the £351, which are arrears that he ought to have kept down as between himself and the person who has got this decree. Further, it is quite plain that as between *Waterson* and *John Elgey* any arrears of interest that may accrue during the lifetime of *John Elgey* in future would have to be borne by him. Now, instead of asking for a transfer corresponding in terms to the reconveyance which is substantially directed by the order of the 27th of July, 1883, *John Elgey* asks for an absolute transfer to his nominee. The effect would be simply this. The transferee, there being interest in arrear, would probably be entitled to sell the next day if the mortgage deed is framed in the usual way; the deed has not been produced, and

(1) 20 Ch. D. 724.

therefore I cannot say exactly how that is. In that way he might destroy the equity of redemption, by exercising the power of sale. If a contract was once entered into there would be no further right in *Waterson* to redeem, but immediately the transfer had been executed, and assuming that the power of sale was not exercised, *Waterson* would be entitled himself to require a transfer from the transferee, and then according to this view of the case, *John Elgey* would the next day be entitled to require *Waterson's* transferee to transfer, and so it would go on between these two parties day after day, and on each occasion, according to the usual rule, which I should assume, without having the question argued, would apply to a case of this kind, the transferee would be entitled to the costs of the transfer, because the interest is in arrear. So that by these constant transfers the result would be that there would be heaped up against the inheritance the costs so long as the parties went on in that course. It appears to me that was not what the Act intended, and taking the language of the section, I consider that the words "on the terms on which he would be bound to reconvey," do not refer merely to the amount of principal, interest, and costs, but to "the terms" generally, because if the Legislature intended simply to refer to principal, interest, and costs, it would have been very easy to say so. On the face of the order of the 27th of July, 1883, it appears to me that *John Elgey* is not entitled to have and could not get an unconditional reconveyance, he can only get a reconveyance on terms. The terms are that the trust should be affixed to the legal estate which he would take on the legal conveyance. It appears, therefore, that any transfer he might propose must be a transfer corresponding with the deed. It is not contended that *John Elgey* asks for any such transfer; he only asks for an order of the nature I have described.

The result is, it appears to me, that the motion must be refused with costs.

I have not in this judgment said anything about the effect of the order of the 27th of July, 1883, itself, because that might be a question worthy of consideration on some future occasion. I have proceeded in this judgment simply on the language of the Act, and the language of the order of the 27th of July, 1883,

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assuming the Act to be applicable to such an order. It may be a question how far the 15th section of the Act could be applied to such an order as that of the 27th of July, 1883 (which does not contain words shewing that the 15th section is to apply) by directing a re-assignment instead of a reconveyance; that question I leave entirely open.

Solicitors: *Henry Brougham Roberts*, agent for *William Robinson, Darlington; Williamson, Hill, & Co.*

G. M.

PEARSON, J.

1883

Dec. 20.

1884

Jan. 15.

In re SERGEANT. MERTENS *v.* WALLEY.

[1883. S. 4837.]

Will—Construction—"Unmarried."

Although the word "unmarried" is one of flexible meaning, and may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, and, in the absence of any context shewing a different intention, the word will be so construed.

ADJOURNED SUMMONS.

This was an originating summons, issued on the 25th of October, 1883, by the surviving trustee and executor of the will of *Thomas Sergeant*, deceased, for an order declaring who were the persons entitled to his personal estate, and for the administration of the trusts of his will.

The testator, by his will, dated the 22nd of June, 1846, directed that certain moneys therein mentioned should be invested as therein stated and the income thereof paid to his wife during her life, and that on her decease the principal should be divided into three shares, one third to be paid to his nephew *F. T. Sergeant*, and "the remaining two-thirds to be divided equally amongst the surviving unmarried daughters of my wife's three sisters, Mrs. *Jardine*, Mrs. *Cumming*, and Mrs. *Sims*. Should my nephew die before his aunt his share to be divided equally amongst the daughters mentioned." The testator died on the 30th of June, 1846. The widow died on the 20th of July, 1883.

At the time of her death there were living Mrs. *Everett*, Mrs. *Walley*, Mrs. *Betts*, and Miss *Sims*, who were daughters of sisters of the testator's wife. Mrs. *Everett* married after the death of the testator, and her husband was still living. Mrs. *Walley* married on the 16th of September, 1858, and her husband died on the 4th of November, 1868. Mrs. *Betts* married on the 3rd of August, 1858, and her husband was still living at the death of the testator's widow. Miss *Sims* had never been married. The question was as to the meaning of the word unmarried, whether

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it meant "never having been married," or whether it meant simply not having a husband at the time when the fund became divisible.

Medd, for the trustee.

Badnall, for Mrs. *Walley*:—

The unmarried daughters must be ascertained at the time of the testator's death: *In re Bennett's Trust* (1); *Blagrove* v. *Coore* (2); *Jubber* v. *Jubber* (3). But, at any rate, the word "unmarried" is a word of flexible meaning; it may mean either "never having been married," or "not having a husband" at the time when the gift in question is to take effect. The latter is the literal or primary meaning. Dr. *Johnson* in his Dictionary defines "unmarried" as "not having a husband," and "married" as "joined in wedlock." The context of the will in which the word occurs may be such as to induce the Court to give the word the other meaning, and a very slight indication of intention will be sufficient, but the cases shew that, in the absence of any context shewing such an intention, the word will be construed as "not having a husband": *In re Norman's Trust* (4) *In re Thistlethwayte's Trust* (5); *In re Lesingham's Trusts* (6).

[PEARSON, J., referred to *In re Ball's Trust* (7); *Emmins* v. *Bradford* (8); *Dalrymple* v. *Hall* (9).]

Onslow, for Miss *Sims*, was not heard.

PEARSON, J.:—

I cannot say that I entertain any doubt whatever about this case. The question is, what is the meaning of the word "unmarried." I agree that you must construe the word, which is capable of two meanings, according to the context in which you find it. It may mean either "never having been married," or "not having a husband" at the time in question. In order not

(1) 3 K. & J. 280.
(2) 27 Beav. 138.
(3) 9 Sim. 503.
(4) 3 D. M. & G. 965; 22 L. J. (Ch.) 720.
(5) 24 L. J. (Ch.) 712.
(6) 24 Ch. D. 703.
(7) 11 Ch. D. 270.
(8) 13 Ch. D. 493.
(9) 16 Ch. D. 715.

to defeat the evident intention of a testator the Courts have in some cases held that the word meant "not having a husband," but I think its primary or natural sense is "never having been married." Slight circumstances, no doubt, will be sufficient to give the word the other meaning, but, if I was asked to construe the word as occurring in an absolutely colourless instrument, I should construe it "never having been married." I am far from thinking that the present will is absolutely colourless, and in my opinion the sensible construction of the word "unmarried" as used in it is "never having been married." [His Lordship read the gift, and continued:—] Why are the unmarried daughters of his wife's sisters selected by the testator as objects of his bounty, and the married daughters left out? The answer, I think, is, that in this country when a lady who is a spinster marries some provision is usually made for her, either by her own relatives or by her husband. This testator was minded to make a provision for the "unmarried" daughters of his wife's sisters, and upon the terms of the will I cannot see any reason for giving to the word "unmarried" any meaning but never "having been married." I am glad to find myself fortified in my view that this is the primary meaning of the word by the decision of Vice-Chancellor *Hall* in *Dalrymple* v. *Hall* (1), and I hold that this is the meaning in the present case.

Solicitors: *Lee, Houseman, & Brodie; H. Tyrrell; Crosse & Sons*, agents for *Jackson, Brighton.*

(1) 16 Ch. D. 715.

W. L. C.

PEARSON, J.

1884

March 10, 11, 22.

HOLLAND *v.* WORLEY.

[1883 H. 5335.]

Easement—Light—Obstruction—Injunction or Damages—Discretion of Court—Lord Cairns' Act (21 & 22 *Vict. c.* 27), *s.* 2 [*Revised Ed. Statutes, vol. xiii., p.* 268.]

In exercising the discretion given by sect. 2 of *Lord Cairns' Act*, to award damages in substitution for an injunction, in the case of a substantial interference with a plaintiff's ancient lights, the Court will not, when the result of the defendant's buildings would be, if they were allowed to continue, to render the plaintiff's property absolutely useless to him, compel the plaintiff to sell his property out and out to the defendant. But, if the injury to the plaintiff will be less serious, and his property will remain substantially useful to him, if the defendant's buildings are permitted to continue, the Court may exercise its discretion by awarding the Plaintiff damages in lieu of an injunction, and for the purpose of exercising that discretion the Court will take into consideration the nature and situation of the property, *e.g.* the circumstance that it is situate in the centre of a large city, such as *London*.

Aynsley v. *Glover* (1), *Krehl* v. *Burrell* (2), and *Smith* v. *Smith* (3), considered.

THIS action was brought to restrain an obstruction by the Defendant of the Plaintiff's ancient lights.

The Plaintiff was the owner in fee of four cottages having ancient lights situate respectively, two on the east side, and two on the west side, at the south end of a narrow court or alley called *Northumberland Back Alley*, near *Fenchurch Street*, in the city of *London*. The alley ran from north to south, and was entered at the north end by a narrow covered passage. The alley was about ten feet wide between the houses which were on each side of it, and it formed a *cul de sac*. The Defendant's land was situate at the south end of the alley, from which it had formerly been separated by a fence in which was a gate about eight feet high. Part of the land had been an open yard, and on part of it there had stood buildings from thirty to thirty-five feet high. The Defendant intended to raise new buildings on

(1) Law Rep. 18 Eq. 544. (2) 7 Ch. D. 551.
(3) Law Rep. 20 Eq. 500.

this land to the height of forty-six feet. The Plaintiff's cottages were about twenty feet high. They were let to weekly tenants.

The facts are stated in greater detail in the judgment of the Court.

The writ in the action was issued on the 5th of December, 1883, and on the 7th of December, the Plaintiff obtained an interim injunction. By his statement of claim the Plaintiff alleged that the Defendant's new buildings had already obstructed and diminished the amount of light coming to the Plaintiff's ancient windows, and that, if the Defendant was permitted to continue the erection of his new buildings in the manner intended by him, the Plaintiff's ancient lights would be further obstructed to a very material extent. The Plaintiff further alleged that, by reason of what the Defendant had already done, the value of the Plaintiff's property had been lessened, and that its value would be further deteriorated if the Defendant was permitted to proceed with his new buildings as intended.

The Plaintiff claimed an injunction to restrain the Defendant from erecting or continuing to erect, or permitting to be erected, or to remain erected on any part of the land adjoining towards the south, south-east or east of the Plaintiff's houses, or any of them, any building so as to obstruct the ancient lights of the Plaintiff's houses as the same had been theretofore enjoyed by him, and damages for the obstruction already occasioned.

Higgins, Q.C., and Sir *Arthur Watson*, for the Plaintiff:—

The evidence shews that there will be such a substantial diminution of light as will entitle the Plaintiff to an injunction.

Warmington, Q.C., and *Edwin Ward*, for the Defendant:—

The Plaintiff has not shewn substantial damage: *Kino* v. *Rudkin* (1). At any rate it is a case for damages, not for an injunction: *Aynsley* v. *Glover* (2).

Higgins, in reply:—

[PEARSON, J.:—Is it not rather a case for damages?]

The Court will not take into account the profit which a building

(1) 6 Ch. D. 160. (2) Law Rep. 18 Eq. 544.

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owner will make by his new buildings, nor will it consider the balance of convenience and inconvenience, unless in a case where there is very small injury on the one side and very large damage on the other.

The discretion given by sect. 2 of *Lord Cairns' Act* to award damages in lieu of an injunction is a very limited one, and no sufficient reason has been shewn for exercising it in the present case. The Defendant does not shew that any special damage will be caused to him by stopping his building.

[PEARSON, J.:—In *Aynsley* v. *Glover* (1), *Jessel*, M.R., said that the injury to a Defendant may be taken into account.]

In the case to which the Master of the Rolls there referred the circumstances were special, that is not so here. No doubt we must prove substantial material injury, and this we have done. It makes no difference that the Plaintiff's is a small property compared with the Defendant's. The Court will have regard to the possible future use of the Plaintiff's property: *Aynsley* v. *Glover* (2). If a Defendant is warned of an objection to his buildings he goes on at his own peril: *Beadel* v. *Perry* (3), *Smith* v. *Smith* (4). There has been no laches on the Plaintiff's part.

March 22. PEARSON, J.:—

This action is brought in order to obtain an injunction to restrain the Defendant from erecting buildings darkening the ancient lights of some houses of which the Plaintiff is the owner. The defence is that the buildings do not, and will not, to any appreciable extent or in any substantial way, darken the windows. The first question, therefore, which I have to determine is one of fact.

[After stating the width of the alley, and the situation and height of the Plaintiff's houses, his Lordship continued:—]

The Plaintiff's houses vary in depth from twelve to fifteen feet, so that the whole width of what I may call *Back Alley* is about forty feet. The Defendant's premises adjoin the south end of this alley. Before the buildings began to be erected of

(1) Law Rep. 18 Eq. 555.
(2) Ibid. 544.
(3) Law Rep. 3 Eq. 465.
(4) Ibid. 20 Eq. 500.

which complaint is now made, there was at the south end of *Back Alley*, leading into what I will call the Defendant's premises, although they have had various owners from 1856 downwards, a solid gate, the gate itself being some six feet high with some palisading at the top of it. Altogether that erection was not more than eight feet high. I should say that in respect of all the measurements to which I may refer in the course of my judgment, inasmuch as there is a difference between the witnesses as to what the measurements really are, I shall, as far as I possibly can, take the mean of the different measurements stated to me, or at any rate I shall mention the measurements in such a way as I hope will do no injustice either to the Plaintiff or to the Defendant. On opening the gate to which I have referred, you came into a yard, which was originally ten feet wide by twenty feet long. On the right hand, or the west side, there was a building which was occupied as the foreman's house. It was from thirty to thirty-five feet high, certainly not more than thirty-five feet, and probably not quite so much as thirty feet. A part of that house projected beyond the line of the Plaintiff's houses, and I shall assume in favour of the Defendant that this projecting part went up to the top of the house, that is, up to the roof, but not higher than the parapet, one of the rooms of the house having a dormer window in the roof. From the south, and extending southwards as well as south east, there was a warehouse, which, according to the evidence before me, was certainly thirty-five feet high. On the left hand, or the east side as you entered the yard, there was a building originally of one storey, which had been used as a harness room, but, before the year 1856, one or two storeys had been added to it. It is a curious fact that witnesses who know the place perfectly well do not agree whether one storey or two storeys had been added. But the height of the building was certainly not more than twenty-seven feet, if it was so high.

That being the state of things, in 1866 some of these buildings were pulled down, and, therefore, from 1866 a larger quantity of light found its way into *Back Alley*, and one of the difficulties in the case arises from this, that we have now to judge of the effect of the Defendant's obstruction with reference to the light

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as it existed before the year 1866. I should add to my description of the property that on the west side, and on the south side, and extending towards the street which runs on the east side, there is a wall, belonging to one of the dock warehouses, which is not less than sixty feet high. There were also on the east side buildings of a considerable height, so that in fact *Back Alley* was, as it was described by one of the witnesses, something like a well. The Plaintiff's houses were, as I have said, at the south end of *Back Alley*, close upon the gate which opens into the Defendant's yard, and, up to the time when the Defendant began his new buildings, they had enjoyed such direct light as could come in over the surrounding buildings, and a certain amount of lateral light. According to the evidence of the Defendant's witnesses there was more direct light than lateral light, but, inasmuch as, according to Mr. *I'Anson*, one of the Defendant's witnesses, the direct light to No. 3 did not exceed the angle of 33°, it is perfectly plain that the lateral light was of the greatest possible importance to them.

Now the Defendant is doing this. Whereas the foreman's house simply came up to the gate, and there was an aperture, if I may so call it, above the gate eight feet wide admitting light into *Back Alley*, the Defendant is now bringing that building forward so as to leave between it and the building occupying the site of the harness room, an aperture of only about two feet wide. Behind that he is making a new court, twenty feet wide by twenty-eight in depth, and he says that a great deal of diffused light will come in over the building which stands where the harness room was, and through that aperture of two feet, and will give additional light to *Back Alley*. [His Lordship commented on the evidence and continued.] I come to the conclusion that the Defendant's buildings, if they are erected according to his present plans, will darken the rooms in the Plaintiff's houses. I am also of opinion that they will darken them to such an extent as would entitle the Plaintiff at law to damages sufficient to be called in this Court, according to the late Master of the Rolls' phrase, considerable damages. It is exceedingly difficult to say exactly what the amount of the damages would be. One of the Plaintiff's witnesses said it would reduce the selling value of the premises by one third.

One of the Defendant's witnesses said that it would not injure them at all, that they would be just as good for letting purposes as they are now; that cottage property in the middle of the City is very scarce, and the Plaintiff's cottages are therefore very valuable, and would remain so even if they were made much darker than they will be made, and would nevertheless still command the same rent. It seems to me that this is not altogether a fair way of estimating the damage. It may be very true that, owing to the necessities of the working classes, both at the present time, and in the future, as the population of *London* increases, and cottages become scarcer, the rent of these cottages as cottages will not decrease. But I think I am entitled to consider that this property may be used hereafter for other purposes than cottages. And I think I am bound to consider, not only what the letting value would be, but what the selling value would be, if the property were to be sold, not as cottages, but as a piece of ground which any person purchasing would obtain as a certain area of building ground. Taking that into consideration, the conclusion at which I arrive is this that the damage caused by the obstruction of light by the proposed buildings of the Defendant would be such as to reduce to an appreciable extent the selling value of the property.

That being so, I have power to grant an injunction, and the question arises (and to my mind this is the most difficult part of the case), whether, under the circumstances, I ought to grant an injunction, or whether, adopting the power given to the Court by Lord *Cairns' Act*, I ought simply to give the Plaintiff damages. I regret to say that authority is very scant upon the question in what cases that power ought to be used, and such authority as there is upon the subject rather adds to than removes my difficulty. In *Aynsley* v. *Glover* (1) the Master of the Rolls, Sir *George Jessel*, said (2), "It is necessary to consider the effect of the Act commonly called *Lord Cairns' Act*, as to the jurisdiction of this Court. It appears to me that the 2nd section of that Act gave a new power to the Court of Chancery. The words are these: 'In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . it shall be

(1) Law Rep. 18 Eq. 544. (2) Law Rep. 18 Eq. 554.

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lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction.' Now the first remark upon that is this: it only arises when the Court of Chancery has jurisdiction to grant an injunction. It can only apply to those cases in which the Court could have granted an injunction, at all events at the time of the filing of the bill; and, if the Court could have granted an injunction, it ought to have granted the injunction. Therefore, it must apply to cases in which, before the passing of the Act, the Court would have granted an injunction; and it gives a new power to the Court purely discretionary—the words are 'if it shall think fit'—to substitute damages in some one or more of the cases in which, before the passing of the Act, this Court would have granted an injunction. No doubt this power was only to be exercised at the hearing, and not upon interlocutory application; and it will deserve the most serious consideration hereafter as to what class or classes of cases this enactment is to be held to apply. Although in terms so wide and so long, it never could have been meant, and I do not suppose it will ever be held to mean, that in all cases the Court, of its own will and pleasure or at its own mere caprice, will substitute damages for an injunction. That cannot be; it must be for the Court to decide, upon consideration, to what cases the enactment should be held to apply. In the case of *Curriers' Company* v. *Corbett* (1) we have an instance in which a Judge has said the Act ought to apply in some cases. I had one before me in which, there being comparatively a very trifling injury, although sufficient perhaps to maintain an injunction, comparing that with the injury inflicted upon the defendant, I thought, under the special circumstances, damages should be given instead of an injunction. I am not now going, and I do not suppose that any Judge will ever do so, to lay down a rule which, so to say, will tie the hands of the Court. The discretion, being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff

(1) 2 Dr. & Sm. 355.

who is enabled—I do not like to use the word 'extort,' but—to obtain a very large sum of money from a defendant merely because the plaintiff has a legal right to an injunction. I think the enactment was meant in some sense or another to prevent that course being successfully adopted. But there may be some other special cases to which the Act may be safely applied, and I do not intend to lay down any rule upon the subject." That does not appear to me to throw very much light on the subject; it says only that it is a reasonable discretion to be reasonably exercised.

In *Krehl* v. *Burrell* (1), before the same learned Judge, the plaintiff complained that the defendant had blocked up a right of way to his house. The Master of the Rolls found that there was such a right of way, and that the defendant's building had blocked it up. He says this (2): "The question I have to decide is, whether the appeal to me by the defendant to deprive the plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. It is true he has another way to his house by *Coleman Street*; but it was obvious, when the facts were mentioned to me, that, as regards the custom of the house, it would be very seriously interfered with by depriving it of the back entrance, which was very much used, for special and intelligible reasons, by the customers. That being so, the question I have to consider is, whether the Court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court, 'You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,'—of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the

(1) 7 Ch. D. 551. (2) 7 Ch. D. 554.

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Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power, somewhat similar to that with which railway companies have been invested for the public benefit under the *Lands Clauses Act*, to compel people to sell their property without their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me, I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute, and I should add one more to the number of instances which we have, from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavoured to deprive his neighbour, the man with small possessions, of his property, with or without adequate compensation." And in *Smith* v. *Smith* (1), where the defendant had built up a house close to the plaintiff's windows, and where it was practically impossible that the plaintiff could continue to live in his house if the defendant's house remained, Sir *George Jessel*, M.R., said (2): "In the present case, the injury was most serious to the plaintiff, and he could not be compensated without the defendant buying the house, while as regards the defendant I am not satisfied that any considerable sum has been laid out upon his buildings. Again, the plaintiff was occupier of the house, so that it was a personal injury to him. Taking all the circumstances together, therefore, I think I have no right to say that the plaintiff is to give up the house and take pecuniary compensation for it, because it is more convenient to the defendant." And in a previous part of the same judgment, speaking of *Lord Cairns' Act*, he said: "Now this discretion must be a judicial discretion, exercised according to something like a settled rule, and in such a way as to prevent the defendant doing a wrongful act, and thinking that he could pay damages for it. Without laying down any absolute rule, in the first place it is of great importance to see if the defendant knew he was doing wrong, and was taking his chance about being disturbed in doing it."

It seems to me that no settled rule is laid down, or even

(1) Law Rep. 20 Eq. 500. (2) Law Rep. 20 Eq. 505.

suggested, by the Master of the Rolls, but he leaves it, where the Act leaves it, as a matter of discretion, to be exercised in such a way as the Court, under the circumstances of each case, shall think right. But I do not think that I shall be misinterpreting the Master of the Rolls, if I say that his opinion (in which I heartily concur) seems to me to be this, that, if the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation which could be given to the plaintiff would be to compel the defendant to purchase his property out and out, the Court will not, in the exercise of the discretion given it by *Lord Cairns' Act*, compel the plaintiff to sell his property to the defendant. But in other cases, where the injury to the plaintiff would be less serious, where the Court considers that the property may still remain the plaintiff's and be substantially useful to him, as it was before, and the injury, therefore, is one of a nature that can (without taking away the plaintiff's property from him) be compensated by money, then the Court, if it thinks right, may exercise the discretion given it by the Act.

Now, looking at all the circumstances of this case, I come to the conclusion that, although if the Defendant's buildings are allowed to go on there will be some injury done to the Plaintiff, the injury will not be so great as to render the property useless to him, even for the purpose for which it is employed at the present moment. And looking at the nature of the property, and considering its situation in the heart of a great city like *London*, I think I shall not be doing wrong if, instead of granting an injunction, I exercise my discretion by giving the Plaintiff damages. And, looking at the evidence which has been given, which varies in this way—one of the witnesses for the Plaintiff saying that the selling value of the property will be diminished to the extent of one-third or one-fourth, its present value being £1000, and a witness for the Defendant saying that if the light were reduced by one-third, the diminution in the letting value of the property would be one-tenth—I come to the conclusion that £150 will be the proper compensation to be paid to the Plaintiff. Therefore, I shall give judgment for the Plaintiff for that sum.

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I allow the building to go on, and direct the Defendant to pay the Plaintiff £150 damages, and of course, the Defendant must pay all the costs of the action.

Solicitor for Plaintiff: *E. Bromley.*
Solicitors for Defendants: *Hughes, Hooker, & Co.*

W. L. C.

PEARSON, J. 1884 *March* 1, 22.

UPTON *v.* BROWN.

[1875 U. 1 a.]

Settlement of Business on Trust for Successive Tenants for Life—Loss during First Tenancy for Life—Profit during Second Tenancy for Life—Apportionment of Loss between Persons interested.

In an action to execute the trusts of a settlement, by which (*inter alia*) a business was assigned to trustees on trust for successive tenants for life and remaindermen, a receiver and manager was appointed to carry on the business. During the life of the first tenant for life the business was carried on by the receiver at a loss; during the life of the second tenant for life profits were earned;—

Held, that the loss must be made good out of the subsequent profits, and not out of capital.

PETITION.

This action was commenced on the 1st of November, 1875, for the execution, under the direction of the Court, of the trusts of a marriage settlement, dated the 4th of November, 1873, by which (*inter alia*) the business of an eating-house keeper was assigned to trustees upon the trusts therein declared. The trusts are fully stated in the report of *Upton* v. *Brown* (1). In the events which happened, and according to the construction which the Court put upon the settlement, the income, including the profits of the business, upon the death, on the 24th of October, 1875, of *Sarah Robinson* (the wife of *G. D. Robinson*), vested in *George Upton*, an infant, who died on the 8th of August, 1877, aged fourteen years. Mr. Justice *Fry* held that, on the death of the infant, the trustee in bankruptcy of *G. D. Robinson* became entitled to the income of the settled property (including the profits of the business)

(1) 12 Ch. D. 872.

during the life of the bankrupt. On the 2nd of November, 1875, an order was made in the action appointing *Samuel Brown*, one of the trustees of the settlement, receiver and manager of the business until sale or further order. In March, 1878, *Samuel Brown* died, and on the 28th of March, 1878, *Thomas Lancaster*, the other trustee of the settlement, was appointed receiver and manager in his place. During the life of the infant the business was carried on by *Samuel Brown* at a loss, and it was found by the Chief Clerk that a sum of £573 7*s.* 8*d.* was due to his estate in respect of this loss. Since the death of the infant the business had been carried on at a profit.

The petition was presented on the 24th of January, 1884, by the administrator of the deceased infant, for the winding-up of the action by the payment of costs and the giving of proper directions as to certain funds which were in Court. The principal question raised was whether the £573 7*s.* 8*d.* was to be paid out of capital, or out of the profits earned after the death of the infant.

Sir *Arthur Watson*, for the Petitioner:—

The balance found due to the estate of the late receiver ought to be paid out of income; the loss during the lifetime of the infant ought to be made good out of the subsequent profit.

J. M. Lloyd, for the trustee in bankruptcy of *G. D. Robinson*:—

The maxim applies, *qui sentit commodum sentire debet et onus;* if there had been a profit during the life of the infant it would have belonged to him, and he, therefore, ought to bear the loss. It should be paid out of the capital which forms part of his estate.

Warmington, Q.C., for the original Plaintiffs, and for the personal representative of the deceased receiver.

Coltman, for *Thomas Lancaster*.

Sir *Arthur Watson*, in reply.

March 22. PEARSON, J.:—

The question is whether the loss which was incurred by the receiver in carrying on the business during the life of the first

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tenant for life, who received no profit, is to be made good out of capital, or out of the profit which has arisen during the second and now existing tenancy for life. I think it ought to be made good out of that profit, and for this reason. If the receiver had contracted debts in carrying on the business during the life of the first tenant for life, they would have been treated as contracted on behalf of the business generally, and must have been paid out of future profits, if there had been any. I think this loss must be treated as if it had been a debt incurred by the receiver, and must be paid in the same way.

Solicitors: *Shum, Crossman, & Co.; R. Ballard; S. D. Hamilton; A. Hicks & Arnold.*

W. L. C.

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1884

March 29, 31.

In re LORD RANELAGH'S WILL.

Leasehold for Lives—Settlement on Trust for Tenant for Life and Remaindermen—Overriding Trust for Renewal—Renewal become impossible—Purchase of Reversion by Assignee of First Tenancy for Life and ultimate Remainder—Rights of other Cestuis que Trustent.

A leasehold for lives was devised by a testator who died in 1820 to trustees, on trust for a tenant for life and other persons in remainder, the ultimate remainder in fee being given to the tenant for life. The first trust was to renew the lease from time to time, paying the necessary fines and expenses out of the rents, or raising them by mortgage. In 1825 the trustees obtained a renewed lease for three lives, one of which was that of the tenant for life. In 1855 and 1859 respectively the other two lives dropped. In October, 1876, the tenant for life contracted to sell all his interest in the property to *B.*, and a conveyance was executed in March, 1879. In December, 1876, the Ecclesiastical Commissioners, in whom the reversion subject to the lease was then vested, and who would not renew the lease, contracted to sell the reversion to *B.*, and in August, 1879, they executed a conveyance to him, the conveyance being expressly made subject to "such trusts, equities, estates, and interests" as then affected the leasehold interest. In June, 1878, the School Board for *London*, under their statutory powers, took part of the property, and in January, 1880, they paid the purchase-money and compensation money into Court. The legal estate in the lease was outstanding in the representatives of the last surviving trustee of the will:—

Held, that, irrespectively of the form of the conveyance of the reversion

to *B.*, it was, according to the ordinary doctrine of a Court of Equity, impossible for him to purchase the reversion otherwise than as a trustee for the persons interested in the lease under the trusts of the will, and that, subject to his right to be recouped the purchase-money, he was only entitled to an order for payment on the interest on the fund in Court during the life of the tenant for life under the will.

Hardman v. *Johnson* (1) distinguished.

PETITION.

This was a petition under the *Elementary Education Act*, 1870, and the *Lands Clauses Consolidation Act*, 1845, for the payment out of Court of money which had been paid in by the School Board for *London* as the purchase-money of land taken by them under their statutory powers.

By the will, dated the 20th of August, 1814, of *Thomas* Viscount *Ranelagh*, he devised his estates in the county of *Norfolk* (subject to certain terms, and the trusts thereof respectively declared for the purpose of securing an annuity to his widow for her life and portions for his younger children), To the use of his son *Thomas Heron* (afterwards Viscount *Ranelagh*) and his assigns for his life, with remainder to the use of trustees in fee during his life on trust to preserve contingent remainders, with remainders to the use of his first and other sons successively in tail male, with remainders to his daughters, in equal shares, as tenants in common in tail, with cross remainders among them, with remainders to the use of the second and other sons of the testator successively in tail male, with remainders to the use of the testator's daughters and their respective assigns for their respective lives, share and share alike, as tenants in common, with remainder to the use of trustees in fee during the lives of the daughters, in trust to preserve contingent remainders, with remainders to the use of the heirs of the body of the daughters respectively, with an ultimate remainder to the use of the testator's right heirs in fee. And the testator devised to *W. Y. Knight* and *H. W. Knight* and their heirs all his lands and hereditaments situate in the parish of *Fulham*, and held of the Bishop of *London* by virtue of leases for lives, to hold the same unto and to the use of *W. Y. Knight* and *H. W. Knight* and their heirs for and during

(1) 3 Mer. 347.

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all such terms, estates, and interests as the testator had therein, Upon trust from time to time, as often as occasion might require, to renew the lease or leases of the same premises in the names of the trustees. And the testator directed that the trustees should, out of the rents and profits of the same hereditaments and premises, pay the rents which were or should be reserved and made payable by the several leases for the time being of the same premises respectively, and also all costs, charges, and expenses attending the execution and performance of the several lessee's covenants contained in the leases, and should from time to time, out of the rents and profits of the same premises, or by sale or mortgage thereof, or of some part thereof, raise such sum or sums of money as should be necessary for satisfying the fines which should become due and payable upon any renewals of the leases of the same premises or any part thereof, and all expenses attending the same, and in or about procuring such new leases; and, subject thereto, upon trust that all and every the hereditaments and premises lastly therein before devised should remain and go along with the freehold estates in the county of *Norfolk* thereinbefore devised, and be therewith held and enjoyed, and the rents and profits thereof received, by the same persons and be applicable to the same uses, and subject, together with and in aid of the *Norfolk* estates, to the same charges and payments and powers as were thereinbefore limited, expressed, and declared concerning the same estates, or as near thereto as the nature of the premises lastly thereinbefore devised and the rules of equity would permit.

The testator died on the 4th of July, 1820, and his son, *Thomas Heron*, thereupon became Viscount *Ranelagh*. The testator left also three daughters surviving him.

At the time of his death the testator was possessed of some leasehold hereditaments in the parish of *Fulham*, including a piece of land called *Hanger*, which were held under a lease, dated the 31st of March, 1790, granted by the Bishop of *London* for the lives of certain persons therein named.

On the 27th of May, 1825, the then Bishop of *London* granted to the trustees of the testator's will a renewed lease of the lands comprised in the lease of the 31st of March, 1790, for and during

the lives of *Henry Holland*, *Lancelot Holland*, and *Thomas Heron* Viscount *Ranelagh*, and the life of the longest liver of them. *Henry Holland* died in 1855, and *Lancelot Holland* died in 1859. The portions payable to the testator's younger children were raised by a mortgage of part of the *Norfolk* estates exclusively, in exoneration of the *Fulham* property. The testator's widow died in 1866.

In 1851 the Act 14 & 15 Vict. c. 104, was passed, which by sect. 1 empowered any ecclesiastical corporation, with the approval in writing of the Church Estates Commissioners, to sell to any lessee under any lease granted by such corporation the reversion of such corporation in all or any of the land comprised in such lease, for such consideration, upon such terms, and in such manner as such corporation and lessee might, with such approval, think fit. Sect. 3 of the Act provided that the interest in lands acquired by any lessee under the Act should be deemed in equity to be acquired in respect of his interest under his lease, and should be subject to the same trusts, charges, and incumbrances as his lease, or any lease obtained on a renewal thereof, would have been subject to, so far as the different natures of the property would admit. The Act was limited in duration to three years from the end of the session in which it was passed, but it was continued by subsequent Acts. By the Act 23 & 24 Vict. c. 124, s. 2, it was provided that on the first avoidance of the see of any archbishop or bishop in *England* after the passing of the Act all the lands belonging to such see (with certain exceptions) should become vested absolutely in the Ecclesiastical Commissioners for *England*. The Ecclesiastical Commissioners refused to renew any leases for lives of lands vested in them.

On the 10th of October, 1876, Viscount *Ranelagh* contracted to sell his life interest in the *Fulham* property, and all other his estate and interest therein, to *Robert J. S. Beeton* and *Thomas Crowle*, who purchased it for partnership purposes. *Thomas Crowle* died in November, 1877. *Elizabeth Crowle*, his widow, was his executrix, and by a deed dated the 24th of March, 1879, Viscount *Ranelagh* conveyed his estate and interest to *Beeton* and Mrs. *Crowle*, as executrix of *Thomas Crowle*.

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On the 30th of December, 1876, *Beeton* and *Crowle* entered into a contract with the Ecclesiastical Commissioners for the purchase of the reversion in fee of the *Fulham* property, subject to the lease of the 27th May, 1825, for £2300, and on the 7th of August, 1879, the Commissioners conveyed the property accordingly to *Beeton* and Mrs. *Crowle*, to hold the same unto and to the use of them and their heirs as tenants in common, but subject to such trusts, equities, estates, and interests as then affected the leasehold interest under the lease of the 27th of May, 1825.

On the 18th of June, 1878, the School Board for *London*, in exercise of their statutory powers, took possession of the piece of land called *Hanger*, and on the 30th of January, 1880, they paid into Court the sum of £1650, being the purchase-money and compensation for the same which had been determined by a jury, together with the further sum of £130 11*s.* 7*d.* for interest thereon, and on the 10th of February, 1880, *Beeton* and Mrs. *Crowle* conveyed the land so taken to the Board.

On the 29th of September, 1880, Mrs. *Crowle* assigned her interest in the purchase-money to *Beeton*.

The sums of £1650 and £130 11*s.* 7*d.*, and the interest accrued due thereon since the payment into Court, were now represented by a sum of £1872 18*s.* 9*d.* Consols, and a sum of £52 13*s.* 4*d.*, in Court.

At the time of the hearing of this petition Viscount *Ranelagh* was seventy-two years of age, and he had never been married.

The petition was presented by *Beeton* and Mrs. *Crowle*, and it asked that the funds in Court might be transferred and paid to *Beeton*.

The facts as above stated were found by a certificate of the Chief Clerk. He also found that the proportion of the purchase-money representing the leasehold interest, on the assumption that the lease was not renewable on the 18th of June, 1878, was £456, or £463 Consols, and £9 5*s.* 9*d.* interest credited in respect thereof.

The trustees of the testator's will were dead, and the legal estate in the lease was outstanding in the representatives of the survivor of them.

Glasse, Q.C., and *Bleby*, for the Petitioners:—

The whole of the fund in Court ought to be paid out to the Petitioner *Beeton*. He purchased the reversion for his own benefit, and was in no sense a trustee for the persons interested in the lease: *Hardman* v. *Johnson* (1); *Randall* v. *Russell* (2). At any rate the Petitioner is entitled to be paid out of the purchase-money in Court the value of the leasehold interest at the time when the Board took the property.

P. V. Smith, for the School Board:—

The assignee of the tenant for life purchasing the reversion from the Ecclesiastical Commissioners could only hold it subject to the trusts of the will: *Hollier* v. *Burne* (3); *Maddy* v. *Hale* (4); *In re Wood's Estate* (5); *In re Barber's Settled Estates* (6); 14 & 15 Vict. c. 104, ss. 1, 3; 17 & 18 Vict. c. 116, s. 9; 23 & 24 Vict. c. 124, ss. 24, 35. There being an imperative trust for renewal, if the lease could not be renewed it ought to have been sold for the benefit of all the persons interested in it. In *Hardman* v. *Johnson* the purchase had been made by a stranger. The true view of the present case is that *Beeton* and Mrs. *Crowle* constituted themselves trustees of the reversion, subject to a lien in their favour for the £2300 which they paid for it. The conveyance of the reversion is made in express terms subject to the trusts affecting the leasehold interest.

Glasse, in reply:—

The Petitioners are not trustees of the whole fund: *Hardman* v. *Johnson*. In the present case the purchase of the reversion has not destroyed any chance of obtaining a renewal of the lease; the Commissioners would not have renewed. *Maddy* v. *Hale* and *In re Wood's Estate* have nothing to do with the sale of a reversion; they relate to the sale of a leasehold interest. At any rate *Beeton* is entitled to an order for the immediate payment to him of that part of the fund in Court which represents income, and for the payment to him during the life of Lord *Ranelagh* of the income of the remainder.

(1) 3 Mer. 347.
(2) Ibid. 190, 197.
(3) Law Rep. 16 Eq. 163.
(4) 3 Ch. D. 327.
(5) Law Rep. 10 Eq. 572.
(6) 18 Ch. D. 624.

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[*Cozens-Hardy*, Q.C., *amicus curiæ*, referred to *Isaac* v. *Wall* (1).

PEARSON, J., referred to *Postlethwaite* v. *Lewthwaite* (2).]

March 31. PEARSON, J. (after stating the facts, continued):—

The first contention is, that inasmuch as Mr. *Beeton* purchased this property from the Commissioners he purchased it for himself, that he has the entire interest in it, and does not hold it subject to the trusts of Lord *Ranelagh's* will. Now it is perfectly plain that if I were to treat this question as depending simply upon the terms of the conveyance from the Ecclesiastical Commissioners to Mr. *Beeton*, that conveyance, in form at all events, indicates that the purchase was made on the trusts of the will. But I should not like to rely upon that alone. I think that if Mr. *Beeton* was entitled to make the purchase for himself alone, without any reference to the trusts of the will, he ought not to be bound by the form of the conveyance, which the Commissioners probably insisted upon being taken in that form. But the question is, whether in the year 1876 he was at liberty to make the purchase in his own interest, or whether it must not be considered, according to the ordinary doctrine of this Court, that he purchased as a trustee and must hold as a trustee. Of course, in so doing, he would be entitled to be recouped the expenses of the purchase. I am of opinion that it is impossible to say that he could have made the purchase otherwise than as a trustee.

At that time the legal estate in the leasehold property was vested in the then trustees of the lease, or in the representatives of the last survivor. At that time, although Lord *Ranelagh's* life was the last life in existence under the lease, there was nevertheless an express trust in the will for the renewal of the lease. And it is impossible not to see that, if the trustees themselves had been active in the trust, if they had been present and had been doing their duty in the trust, it would have been their duty, inasmuch as they could not obtain a renewal, to purchase the fee simple from the Ecclesiastical Commissioners. I think that view is in accordance with all the authorities which were cited to me: with *In re Wood's Estate* (3), *Hollier* v. *Burne* (4), and *Maddy*

(1) 6 Ch. D. 706.
(2) 2 J. & H. 237.
(3) Law Rep. 10 Eq. 572.
(4) Ibid. 16 Eq. 163.

v. *Hale* (1). In *In re Wood's Estate* (2) Vice-Chancellor *James*, referring to *Morres* v. *Hodges* (3) and *Tardiff* v. *Robinson* (4), said (5): "I am of opinion that I am not, in the present case, bound by those cases of *Morres* v. *Hodges* and *Tardiff* v. *Robinson*. In those cases the conclusion arrived at by the Court was, that the tenant for life was entitled *in specie* to the whole rents and profits, charged only with the payment of such a sum as might be required for the renewal, and as no renewal was practicable there was nothing by which the charge could be ascertained, and no means by which any substituted benefit could be ascertained by the Court, to be given to the remainderman. In this case, however, the primary and paramount intention was 'that the estates may be always kept renewed, that the younger children may have an equal benefit of time, and so continue to be provided for for ever,'" And he said further on, the paramount object of the testator "was to have the estate renewed for the equal benefit of all the persons entitled in succession, 'and so continue to be provided for, for ever,' and that all of them in succession would have the benefit of that liberality. He intended to create, and was creating, as he thought, a perpetual estate, out of which he was carving successive interests."

When that case was cited to Lord *Selborne*, L.C., in *Hollier* v. *Burne*, he said (6): "When a testator by his will contemplates and provides for the perpetual continuance of Church leaseholds settled upon a tenant for life with remainders over, by a series of renewals, his purpose evidently is, not that the tenant for life should receive any benefit at the expense of the remaindermen, but that the remaindermen should succeed in due course to the enjoyment of the same property of which the tenant for life is entitled to the income. If the trust for the renewal is absolute and overrides his interest, the tenant for life is not entitled to object, on the ground of the reduction of his income, to any arrangement in lieu of renewal which may be made under the provisions of the Act of Parliament, when renewal ceases to be possible, so long as the best practicable terms are obtained. The

(1) 3 Ch. D. 327.
(2) Law Rep. 10 Eq. 572.
(3) 27 Beav. 625.
(4) 27 Beav. 629 n.
(5) Law Rep. 10 Eq. 583.
(6) Ibid. 16 Eq. 167.

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property purchased from the Commissioners at the price agreed upon represents, under these circumstances, the permanent or capitalized value of the trust property, for the purpose of that succession of interests which the testator intended." Under these circumstances I think it is impossible not to say in the present case that, considering there was a paramount trust for the renewal of the lease, overriding the interest of the tenant for life, when the renewal afterwards became impossible it was the duty of the trustees (unless it was impossible to do so) to purchase the reversion from the Ecclesiastical Commissioners.

Mr. *Glasse* very properly pressed upon me the case of *Hardman* v. *Johnson* (1), in which after consideration Sir *William Grant* thought that the reversion upon a lease belonged to the purchaser, and not to the persons to whom the lease had been given by a will. But that was a very peculiar case, and I think it is no authority for the present case. The testator by his will gave his leasehold interest, which was a lease for three lives and twenty-one years beyond, to his daughter, and in case she should die without issue living at her death, then it was to go over to her sister. The daughter lived till after the expiration of the three lives, and, during the period of twenty-one years which commenced upon the expiration of the last life, she obtained a renewal of the lease, for the lives of herself and two other persons and twenty-one years expectant on the death of the survivor. She then died after the expiration of the first twenty-one years, without issue, having by her will given all her property to the defendant, *John Johnson*, on the supposition that she was entitled to dispose of the renewed lease. Upon her death her sister entered upon the property, claiming so to do under the will of the testator, and the defendant, *John Johnson*, brought ejectment against the sister, and succeeded at law and entered into possession under the judgment at law, and whilst he was in possession under that judgment he bought the reversion. Then a bill in Chancery was filed against him by the sister, claiming that the renewed lease had been taken by the deceased daughter of the testator, and that the reversion had been bought by *John Johnson*, upon the trusts of the will, and they both belonged to the plaintiff. Sir *William*

(1) 3 Mer. 347.

Grant at first doubted whether she was not entitled to the whole of the relief which she asked; but upon further consideration he gave her the renewed lease which her sister had obtained, but he decided that *John Johnson* was entitled to keep the reversion which he had purchased.

Now, to my mind, there are two essential differences between that case and the present. In the first place, there was there no trust for renewal in the will; in the second place, it appears that *John Johnson* bought the reversion whilst he was in possession under the judgment of a Court of Law that he was entitled to the property. I suspect (I can only suspect, because he did not give his reasons) that Sir *William Grant* came to the conclusion that, as *John Johnson* had bought the reversion under those peculiar circumstances, it was impossible to suppose that he had bought it as a trustee for the persons entitled to the lease under the will. That is a very different case from the present, in which I am dealing with a person who, not having the legal estate in the lease in him, assumed to act with reference to that property as if he had had the legal estate, and must, I think, be considered to have acted in the place of the real trustees of the lease, and to have acquired the property for the benefit of all the persons entitled under the will. That disposes of the first question.

But then it is said that, at all events, the petitioner is entitled to be paid out of the money in Court the value of his leasehold interest at the time when the School Board took the property absolutely. But, to my mind, the question is, was there any leasehold interest in existence at the time when the School Board took the property? Now the contract for the sale by Lord *Ranelagh* to Mr. *Beeton* was made in October, 1876; the contract with the Commissioners, which gave Mr. *Beeton* the equitable interest in fee simple, was made in December, 1876, and the School Board did not take the property until 1878. At the time, therefore, when they took the property there was in equity no leasehold interest in existence. In equity the fee simple had been acquired by Mr. *Beeton*, and that of which he was possessed was, not the leasehold interest depending upon the life of Lord *Ranelagh*, but the fee simple which had been exchanged for that leasehold

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interest. That being so, all that he was entitled to was the rent of the property which he had acquired in exchange during the life of Lord *Ranelagh*, that is simply an interest in the property during the life of Lord *Ranelagh* in exchange for the interest in the leasehold during the same life. It is the ordinary case of property which is the subject of a settlement being taken under statutory powers, in which case the tenant for life cannot ask to have the value of his life interest paid out to him, but is entitled simply for his life to the interest of the fund paid into Court, subject to this, that in the present case the petitioner may possibly be entitled to have the money invested in a different way from the ordinary investment in Consols. I am, therefore, of opinion that the only order which I can make upon this petition is to pay out to the petitioner *Beeton* so much of the fund in Court as represents income, or accumulations of income, and to pay him during the life of Lord *Ranelagh*, or until further order, the interest upon the residue of the fund. I have not lost sight of the fact that he will be entitled to be recouped as against the estate the £2300 which was paid to the Ecclesiastical Commissioners; but, looking at the very meagre evidence which has been adduced as regards the existence of any person interested in the estate between Lord *Ranelagh's* estate for life and Lord *Ranelagh's* estate in reversion, I do not think I can deal with this question, which affects the *corpus*, in the absence of any person representing those interests.

Solicitors for Petitioners: *Noon & Clarke.*
Solicitors for School Board: *Gedge, Kirby, Millett & Co.*

W. L. C.

In re RAW.
MORRIS *v.* GRIFFITHS.

PEARSON.

1884

April 22, 2

[1883 R. 2651.]

Construction of Will—Power of Sale discretionary—Conversion imperative.

A testator gave an annuity to his wife, and he gave and bequeathed to his seven children all his real and personal estate after deducting the said annuity; and after his wife's decease the annuity, together with all rents, interests, dividends and profits arising from his estate, to be divided between his seven children equally; and he directed his executors to sell and convert into money his furniture, lands, houses, tenements, and other property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all the money arising from the sale to be invested for the benefit of his children:—

Held, that the direction to convert was imperative, and operated from the death of the testator.

THIS was an originating summons upon the application of the executors of the will of *Leonard Raw* to obtain the opinion of the Court as to whether the shares of the children of the testator under his will became vested immediately upon his death, and whether the direction in the will to convert was imperative, and operated from the death of the testator.

Leonard Raw, by his will, dated the 3rd of March, 1877, bequeathed to his wife, *Mary Ann Raw*, an annuity of £40, and then continued: "I give and bequeath unto my seven children all my real and personal estate whatsoever and wheresoever of which I shall be entitled at the time of my decease after deducting the said annuity to my wife; and after my wife's decease the said annuity of £40, together with all rents, interest, dividends and profits arising from my estate, shall be divided between my seven children, but in case of the death of one or more of them, then between the survivors of them in equal proportions to each one, share and share alike. I direct my executors to sell and convert into money by public auction or private contract my household furniture, land, houses, tenements, and other property

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whenever it shall appear to their satisfaction that such sale shall be for the benefit of my children, and all the money arising from such sale shall be invested in trust in their names in the public stock or funds of *Great Britain* for the benefit of my children. All the interest and dividends arising therefrom shall be divided between my children in equal proportion to each one, share and share alike."

The testator left seven children surviving him, but one of them (*Walter Raw*), who had attained the age of twenty-one years, had since died intestate. The freehold property of the testator, which was valued at about £1700 or £1800, still remained unsold.

On the 22nd of April the summons came on for hearing, when Mr. Justice *Pearson* decided that the interests of the children vested on the death of the testator; and upon the second question being raised as to the conversion of the property upon the death of the testator, the case was ordered to stand over, in order that the summons might be amended.

April 24. *Smart*, in support of the summons:—

The words in this case are in all respects similar to those in *Doughty* v. *Bull* (1), where it was held that the estate, which was directed to be sold, as soon as the trustees should see necessary, for the benefit of the children, must be considered as personal estate, and must go as the money arising from the sale would go. In *Robinson* v. *Robinson* (2) there was a decision to the same effect.

Crossley, Q.C., for the infant heir:—

Where there is an option to sell or not as the trustees shall consider best for the children, and no sale has taken place, then there is no immediate conversion. That was decided in *Lucas* v. *Brandreth* (3), where the testator authorized his trustees to sell as they should think best for the purpose of division. In *In re*

(1) 2 P. Wms. 320. (2) 19 Beav. 494.
(3) 28 Beav. 273.

Ibbitson's Estate (1) there was a similar decision, and so also in *Wheldale* v. *Partridge* (2) and *Beecroft* v. *Wilkin* (before Vice-Chancellor *Stuart*, March 17th, 1867).

PEARSON, J. :—

This case is entirely covered by the decision in *Doughty* v. *Bull* (3). There the testator devised lands to trustees in fee, in trust to apply the profits until sale for the benefit of all his four children and the survivors and survivor of them equally, and on further trust as soon as the trustees should see necessary for the benefit of the children, they should sell the premises and apply the money for the benefit of his four children equally, to be paid at twenty-one or marriage. *A.*, the eldest of the four children, attained twenty-one and married, and died without issue, intestate, leaving a wife. The Lord Chancellor (Lord *King*), confirming the decision of the Master of the Rolls, decreed that the land being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and *A.'s* widow must have a moiety of *A.'s* share ; and the profits of the land until sale must go as the money arising upon sale would. In this case the words are in all respects similar to those in *Doughty* v. *Bull*.

One of the children has died since the death of the testator, and the property has not been converted. The question is whether or not an absolute conversion is directed by the will, in which case the share of the child who has died must be disposed of as if the property had been converted at the death of the testator.

It is contended that there is no conversion directed, as there is an option given to the executors to sell or not as they please. I come to a different conclusion, and I decide that there is an absolute direction to sell, and that it is not optional. The testator evidently understood that the property would be sold during the life of his wife, because he says both the money arising from the sale, as well as the annuity to his wife, and all the interest, was to be divided. It is clear to my mind that the direction

(1) Law Rep. 7 Eq. 226. (2) 5 Ves. 388.
(3) 2 P. Wms. 320.

PEARSON, J. 1884 *In re* RAW. MORRIS *v.* GRIFFITHS.

to sell is peremptory. Therefore the property must be considered as converted from the death of the testator.

Declare that the interests of the children vested on the death of the testator; and that the direction to convert is imperative, and operates from the death of the testator.

Solicitors for all parties: *Belfrage & Co.*

T. W. G.

SMITH *v.* DARLOW.

C. A.
1884
April 2, 8.

Interpleader—Sheriff's Fees—Possession Money—1 & 2 *Will.* 4, *c.* 58, *s.* 6 [*Revised Ed. Statutes, vol. vi., p.* 1101]; 23 & 24 *Vict. c.* 126, *ss.* 13, 14, 17 [*Revised Ed. Statutes, vol. xiii., p.* 868].

On the 17th of February, 1881, the sheriff seized goods under an *elegit* against *D.* for £72, and interest, and costs. *W.* claimed the goods as his. On the 19th of February the sheriff took out an interpleader summons. On the 15th of July an order was made for the sheriff to withdraw on *W.* giving security, in default of security the sheriff was ordered to sell the goods and pay the net proceeds into Court. Security was not given, and on the 12th of August the sheriff paid £52, the net proceeds of the goods, into Court. On the 21st of June, 1882, *Chitty*, J., made an order that *W.* should be barred, that the fund in Court should be paid to the execution creditor, and that *W.* should pay to the execution creditor and the sheriff their costs of the interpleader summons, including in the costs of the sheriff his possession money caused by *W.'s* claim. The sheriff, not being satisfied that *W.* could pay him, appealed, asking that his possession money might be paid out of the fund in Court in priority to the claim of the execution creditor. In the meantime the money had been paid to the Plaintiff:—

Held, by *Cotton* and *Bowen*, L.JJ. (*dissentiente*, *Fry*, L.J.), that 23 & 24 Vict. c. 126, s. 17, making a summary decision under the Act final and conclusive against "the parties," did not make it final against the sheriff, and that he could appeal:

Held, by the whole Court, that where an interpleader has been directed on the application of the sheriff, and the claim of the third party fails, the strict form of order upon which the sheriff is entitled to insist, is to direct the execution creditor to pay the sheriff's charges of the interpleader, with a remedy over to the execution creditor against the third party, though it is a common form of order simply to order the third party to pay them to the sheriff.

By a writ of *elegit* directed to the sheriff of *Yorkshire* he was ordered to seize and take the goods and chattels of the Defendant, *Eli Darlow* (except oxen and beasts of the plough), and cause the same to be delivered to *Thomas Smith* by a reasonable price and extent. The writ was indorsed to levy £72 12*s.* 8*d.*, and £1 10*s.* for costs of execution, and interest on £72 12*s.* 8*d.*, from the 15th of December, 1880, till payment, besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

On the 17th of February, 1881, the sheriff under this writ

C. A. 1884 SMITH v. DARLOW.

seized certain chattels in the house of *Darlow*. On the same day *W. Wilson* served on the sheriff's officer, who was in possession, a notice claiming the goods as his, requiring the sheriff at once to withdraw, and threatening an action in default of his doing so. The sheriff thereupon, on the 19th of February, took out an interpleader summons.

On the 15th of July, 1881, an order was made on the application of the Plaintiff *Smith*, and in the presence of *Wilson* and the sheriff, that *Wilson* should give security to the sheriff for £70 on or before the 22nd of July, 1881, and that on his doing so the sheriff should withdraw from possession. In default of his giving such security, the sheriff was directed to sell the goods and pay the net proceeds of the sale, after deducting the expenses thereof, into Court, to the credit of the action.

Security not having been given, the sheriff sold the goods for £59 1*s.* 8*d.*, which was received on the 12th of August, 1881, and retained £7 4*s.* for the expenses of sale, leaving a balance of £51 17*s.* 8*d.*, which was paid into Court.

On the 21st of June, 1882, Mr. Justice *Chitty*, to whose Court the action had been transferred, made an order that the claimant *Wilson* should be barred, and that no action should be brought against the sheriff—that the fund in Court should be paid to the Plaintiff, and "that the claimant, *W. Wilson*, do pay to the Plaintiff and the said sheriff of *Yorkshire* their costs of the interpleader summons herein, including in the costs of the said sheriff his possession money caused by the said claim, such costs to be taxed by the Taxing Master."

The minutes as given out by the registrar provided that the possession money should be paid out of the fund in Court, but on the application of the Plaintiff, Mr. Justice *Chitty*, on the 12th of April, 1883, directed the order to be drawn up as above. His Lordship gave no formal judgment, but stated that he had ascertained that this was the usual form of order. The fund was accordingly paid out of Court to the Plaintiff.

The sheriff, on the 19th of May, 1883, gave notice of appeal, asking that the order of the 12th of April, 1883, might be reversed or varied, and that the order of the 21st of June, 1882, might be varied by directing his possession money, £43 10*s.*, to

be paid out of the fund in Court in priority to the claim of the Plaintiff *Smith* thereto.

The notice of appeal was not served on *Wilson*.

The appeal was heard on the 2nd of April, 1884.

Romer, Q.C., and *E. Ford*, for the Respondent:—

We take the preliminary objection that this order is a final order which cannot be appealed from, being an order made under the summary jurisdiction in interpleader proceedings. The first Act bearing on interpleader is 1 & 2 Will. 4, c. 58. Sect. 1 gives power to the Court or a Judge to order interpleader where a person is sued who claims no interest in the property, but is sued, or expects to be sued, for it, by some other person who is spoken of in the section as a "third party." If the person taking out the interpleader summons is the defendant he clearly is a "party." Sect. 6 provides for an interpleader order being obtained by the sheriff in cases of adverse claims being set up to goods taken in execution, and the Court is authorized to exercise, for the adjustment of the claims and the relief and protection of the sheriff, "all or any of the powers and authorities hereinbefore contained," so that the intent is to place the sheriff in the same position as if he had been a defendant under sect. 1. Sect. 7 provides for the entering of the orders and decisions made. Then 23 & 24 Vict. c. 126, s. 12, enables interpleader to be granted, though the titles have not a common origin. Sect. 13 enables the Court to order a sale and apply the proceeds. Sect. 14 enables the Court, without any consent, to dispose of small claims in a summary way. Sect. 15 enables the Judge to decide questions of law without directing an action or issue if the facts are not in dispute. Then sect. 17 makes the judgment in an action or issue which had been directed, and the decision of the Court or Judge in a summary manner, conclusive against the parties. This covers a decision under sect. 14 or sect. 15. Taking the two Acts as a whole, their meaning is that in small matters where the Judge thinks it right to exercise the summary jurisdiction he shall finally settle every point arising, and that this shall be binding on all "parties," meaning all persons interested in the questions to be decided, and there is no appeal:

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Witt v. *Parker* (1); *Withers* v. *Parker* (2); *Turner* v. *Bridgett* (3). The possession money is a matter which the Court deals with along with the costs, and if it does not come under the head of costs it is, at all events, included in the words "other matters" in sect. 14. The sheriff is a "party"—he has the benefit of the interpleader order. The Judge could order payment by one of the parties or out of the fund—he has ordered payment by the claimant. The sheriff may feel aggrieved if the claimant is a person unable to pay, but there was jurisdiction to make the order, and when made it is final.

Macnaghten, Q.C., and *G. Henderson*, *contrà*:—

We contend that sect. 17 does not make the order conclusive as against the sheriff, but only as against the parties interested in the goods. Under 1 & 2 Will. 4, c. 58, s. 1, the Court may order a trial, or by consent dispose of the matter in a summary way, and make orders or rules. Sect. 2 cannot apply to the sheriff.

[BOWEN, L.J.:—To what does "therein," in the power by sect. 1 to make "rules and orders therein," refer?]

Possibly this refers to general rules and orders.

[FRY, L.J.:—I think rules and orders in the special case must be intended.]

There are only two things which by the Act are made not appealable—a judgment in an action or issue directed by the Court or Judge, and a summary decision by consent. It is not provided that a decision under sect. 3 shall not be subject to appeal. Sect. 6 carries the case no further. Then as to the later Act, 23 & 24 Vict. c. 126, sect. 13, gives a power of sale. Sect. 14 authorizes summary decisions without any consent; and sect. 17 provides as to the orders being conclusive against the parties. The scheme of the Act is that the question should be tried as between the parties interested in the goods, and that the decision should be binding on them, but on them only.

Romer, in reply.

(1) 46 L. J. (Q.B.) 450; 25 W. R. 518. (2) 4 H. & N. 810.
(3) 9 Q. B. D. 55.

COTTON, L.J.:—

Before giving our judgment on the preliminary objection we will hear the case on the merits.

Macnaghten, Q.C., and *G. Henderson*, for the sheriff:—

The law on this subject is laid down by Mr. Justice *Field* in *Sneary* v. *Abdy* (1). The claim for possession money is authorized by 7 Will. 4 & 1 Vict. c. 55, s. 2. It is decided by *Curtis* v. *Mayne* (2) that the sheriff can deduct it without the authority of the person suing out the writ.

[FRY, L.J.:—If the debt was £100, and the sheriff only levied £100, do you say that he could retain?]

No; it would be his own fault that he did not levy enough.

Romer, Q.C., and *E. Ford*, *contrà*:—

The wrongful claimant has been ordered to pay the expenses, which is the common form of order. The sheriff retains the order as against him, how then can he come for an order against the Plaintiff or the proceeds. He is asking to be paid out of our goods the expenses occasioned by a wrongful claim. In order to succeed he must shew that he has a lien in priority to the claim of the execution creditor. We say that assuming the sheriff to have any lien it is subject to the claim of the execution creditor. Originally the sheriff had only a personal claim for poundage—then a power to levy for it was given him by statute 43 Geo. 3, c. 46, s. 5, to which possession money was added by 7 Will. 4 & 1 Vict. c. 55, but that was only a power to levy an additional sum, and on the fair construction of the statutory provisions his claim must be subject to that of the execution creditor whom it is his first duty to pay. If the proceeds are insufficient to pay him as well as the execution creditor it is his misfortune. The Court has done all it could for him by making the order now under appeal. There is no authority in his favour. *Curtis* v. *Mayne* was a case between the sheriff and the owner of the goods. *Dabbs* v. *Humphries* (3) is for us. In *Searle* v.

(1) 1 Ex. D. 299, 308. (2) 2 Dowl. (N.S.) 37.
(3) 3 Dowl. 377.

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Matthews (before Mr. Justice *Field* in Chambers, Nov. 14, 1883), it is treated as the regular practice to make the unsuccessful claimant pay the possession money. *Curtis* v. *Mayne* (1) does not decide this question. The sole question there was between the sheriff and the person on whose goods the execution was levied. The very words of the statute 43 Geo. 3, c. 46, s. 5, "over and above," shew that the sheriff is to be postponed to the claim of the execution creditor. There may be a claim against the goods for ordinary possession money, but not for possession money on a lengthened possession owing to the wrongful claim of another person.

Macnaghten, in reply :—

Davies v. *Edmonds* (2) shews that the sheriff is entitled to his charges for such possession as was necessary for the sale of the goods.

[COTTON, L.J. :—How can we vary the order in the absence of *Wilson ?*]

The Court can put us under terms.

April 8. COTTON, L.J. :—

This is an appeal by the sheriff of *Yorkshire* from an order of Mr. Justice *Chitty* ordering a fund in Court arising from the sale of goods taken in execution to be paid to the Plaintiff, and ordering the possession money to be paid by the third party, whose claim to the goods has failed. The sheriff is not likely under this order to obtain his possession money, and he therefore complains of the order. It was contended by the Plaintiff that the order was not subject to appeal. The Act 1 & 2 Will. 4, c. 58, s. 6, gave the sheriff a right to apply to the Court for protection where a claim was made by a third party to goods which he had taken in execution. Then the *Common Law Procedure Act*, 1860 (23 & 24 Vict. c. 126), s. 14, enabled the Court or Judge at the request of either party to dispose of the claims of the parties in a summary way, and by sect. 17, it is enacted that, "The judgment in any such action or issue as may be directed

(1) 2 Dowl. (N.S.) 37. (2) 12 M. & W. 31

by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them." This is said to prevent the appeal. The question is whether in the expression "the parties" the sheriff is included, and in my opinion he is not. I think that "parties" means the persons who claim title to the goods. In sect. 6 of 1 & 2 Will. 4, c. 58, the persons spoken of as "parties" are the person issuing the process, and the person making claim to the goods, though it is true that in some sense the sheriff is a party, for he puts the Court in motion. When we come to the Act under which the question arises, 23 & 24 Vict. c. 126, we find that by sect. 14 power is given to the Court or Judge "at the request of either party to dispose of the merits of the respective claims of such parties." There the word "parties" is manifestly used in the sense of persons making a claim to the goods. The sheriff is not a party making a claim nor is he a person at whose request the summary jurisdiction will be exercised. The word "parties" must in my opinion have the same meaning in sect. 17 as in sect. 14. I am therefore of opinion that the decision is not conclusive upon the sheriff and that he can appeal.

The question then is whether the order was right or wrong on the merits. The law is stated by Mr. Justice *Field* in *Sneary* v. *Abdy* (1), that until 43 Geo. 3, c. 46, the poundage could not be levied over and above the sum recovered. Then 7 Will. 4 & 1 Vict. c. 55, s. 2, and the table of fees made in pursuance of the Act, entitled the sheriff to possession money, the amount of which could be added to the sum to be levied. But that would not give him a right to levy for more than the possession money payable in respect of the ordinary possession in executing the process. We have consulted the other Judges and some of the officers of the Queen's Bench Division, and we find that they consider the rule to be, and we think it a reasonable rule, that the sheriff is entitled to be made safe, that he has a right to say to the person who put him in motion "pay me the amount of my proper charges." The strict form of order therefore would be

(1) 1 Ex. D. 299, 308.

C. A. 1884 SMITH v. DARLOW. Cotton, L.J.

where a claim by a third party fails, that the charges should be paid in the first instance by the execution creditor to the sheriff, and that the creditor should have them over against the third party. But we are told that frequently the sheriff does not require the strict order to be made, and that the form of order which Mr. Justice *Chitty* has adopted is more common than the strict form of order. Here, however, the sheriff asked for an order which practically comes to the same thing as the strict form of order which I have mentioned. I think that he is entitled to it, and that the execution creditor must be ordered to pay the amount in dispute with a remedy over against the claimant.

A difficulty arises from the fact that the claimant has not been served. Our order, therefore, will not be drawn up for a week, and in the meantime notice must be given him in order that he may have an opportunity of being heard.

BOWEN, L.J.:—

I am of the same opinion on both points, though I think it an almost insoluble problem of construction whether the sheriff has a right of appeal or not.

As to the second question, I think that the correct form of order is that stated by Lord Justice *Cotton*. We have taken the trouble to collect the views of those most experienced in this subject, and we find that the form of order adopted by Mr. Justice *Chitty*, in which the unsuccessful claimant is directed to pay the sheriff, is very common, and it is a very useful form, but they consider, and we agree, that if the sheriff prefers the liability of the execution creditor he is entitled to have it.

FRY, L.J.:—

I agree with my learned Brothers on the second point, but on the first I have the misfortune to differ from them. In my opinion the sheriff is a party within the meaning of 23 & 24 Vict. c. 126, s. 17. I arrive at that result as follows. The Act 1 & 2 Will. 4, c. 58, as modified by 23 & 24 Vict. c. 126, deals with interpleader of two kinds where an action is brought to recover goods from a person who claims no title to them, but is sued or

expects to be sued for them by a third party, and where a third party sets up a claim to goods taken in execution. By the Act 1 & 2 Will. 4, c. 58, s. 1, which relates to the former kind of interpleader, the Court or Judge was authorized, with the consent of the Plaintiff and the third party, to dispose of the merits of their claims in a summary manner, "and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable." Among these "other matters" would be any claim which the Defendant might have as to any proceedings between him and the Plaintiff. When we come to sect. 6, which relates to interpleader by the sheriff, we find that the Court or Judge has power, "to exercise for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just according to the circumstances of the case." What is necessary for the relief and protection of the sheriff, and what is it just, to determine? Such a matter as possession money is one of the points which ought to be determined. It is an incident to the controversy and ought to be determined for the relief of the sheriff. He is interested in the order, and therefore has a part in the controversy. The 14th section of the *Common Law Procedure Act*, 1860, causes some difficulty, for "parties" there may be meant to denote the claimants of the goods, but it seems to me that it may apply to any of the litigant parties, of whom the sheriff appears to me to be one, for he has such an interest in the order to be made that the Court would not make it without hearing him. Then sect. 17 provides that the decision is to be final and conclusive on the "parties." Who are the "parties"? The sheriff has a substantial interest; he has a part to play. I think, therefore, that he is a party, and that under sect. 17 he is bound. I am of opinion therefore that an appeal does not lie.

Solicitors for the Sheriff: *Bell, Brodrick, & Gray.*
Solicitors for the Plaintiff: *J. & W. Maude.*

H. C. J.

C. A.
1884
April 9.

In re SMITH.
HOOPER *v.* SMITH.

[1880 S. 3996.]

Practice—Appeal—Time for Appeal—Refusal of Application—Special Direction as to Costs—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 15.

Where an application to a Judge is refused, and the Judge adds special directions as to the payment of the costs, that is a refusal of the application within the meaning of Order LVIII., rule 15, and the time for appeal runs from the date of the refusal, not from the drawing up of the order.

IN this action the Plaintiff took out a summons to review the taxation of costs on the grounds therein stated. On the 29th of February, 1884, Vice-Chancellor *Bacon* made the following order: "The Court does not think fit to make any order on the application other than that the costs of the application be taxed, and that £12 13*s.* 2*d.*, cash in Court to the credit of the action, be paid to the Defendant's solicitor on account of the said costs, and that the Defendants do retain the balance of the said costs out of the estate of the above-named *J. Smith*, the testator in the action, in priority to any costs directed to be paid to the Plaintiff."

This order was passed and entered on the 16th of March. On the 25th of March the Plaintiff appealed from the order of the Vice-Chancellor, but the officer of the Court refused to enter the appeal on the ground that more than twenty-one days had elapsed since the refusal of the application by the Vice-Chancellor.

The Plaintiff now moved before the Court of Appeal that the appeal be set down for hearing.

Beddall, for the Appellant:—

The order in this case was not a simple refusal of the application by the Vice-Chancellor; there was a special direction as to the mode in which the costs were to be paid. We did not know whether it would be worth while to appeal until the form of the order was known.

If the time has expired we ask for an extension of the time, as

the delay arose from a misapprehension on the part of the solicitor.

Geare, for the Defendant, referred to *Trail* v. *Jackson* (1); *Berdan* v. *Birmingham Small Arms and Metal Company* (2).

COTTON, L.J.:—

This is a motion that an appeal from an order of Vice-Chancellor *Bacon* refusing an application may be entered for hearing notwithstanding the time limited for an appeal from the refusal of an application has expired. The order was made on the 29th of February, and the appeal was not brought within twenty-one days after that date. In the first place it was said that this was not a simple refusal of an application. The 15th rule of Order LVIII., says, "In the case of the refusal of an application," it does not say, "of the simple refusal." The first question then is whether this was a refusal of an application within the meaning of the rule. I think it was. Besides the refusal of the application the order only gives directions as to the payment of the costs. The only part of the order from which the Plaintiff could appeal was the refusal of this application.

The Plaintiff then asks to have the time enlarged. He says that the solicitor understood the order as not being a simple refusal. I am of opinion that that is not a sufficient ground for extending the time. The application must therefore be refused.

FRY, L.J.:—

I am of the same opinion.

Solicitors: *R. Chapman*; *Geare, Son, & Pease.*

(1) 4 Ch. D. 7. (2) 7 Ch. D. 24.

M. W.

C. A.
1884
May 7.

In re GREAT BERLIN STEAMBOAT COMPANY.

Fraudulent Agreement—Rescinding Fraudulent Agreement—Winding-up.

B., for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit which they were to hold in trust for him. Some of the money having been drawn out with *B.'s* consent, and the company having been ordered to be wound up while a balance remained :—

Held (affirming the decision of *Bacon*, V.C.), that *B.* could not claim to have the balance paid to him.

THE company was formed on the 21st of April, 1882, for the acquisition and working of a concession from the German Government for the running a line of steamers on the River *Spree* and the ship canal from *Berlin* to *Spandau*. The nominal capital was £50,000, in 10,000 shares of £5 each, but no allotment of shares was ever made, and no shares were subscribed for except the seven shares agreed to be taken by the seven subscribers to the memorandum, which they had not paid for.

The Appellant, *J. P. Bowden*, deposed that about the 21st of March, 1883, he was applied to through his solicitors by the directors of the company to transfer a sum of £1000 to the credit of the company at their bankers, Messrs. *Glyn, Mills, & Co.*, so that they might have a creditable balance in case of inquiries from certain *Berlin* bankers with whom they were endeavouring to place a number of the shares of the company, it being agreed that the sum was not to be used for the general purposes of the company, and that the company were merely to hold the sum as trustees for him.

The Appellant further deposed that on the 21st of March, 1883, the following resolution was passed by the board :—

"Resolved to accept £1000 for a period of one month from Mr. *J. P. Bowden* for the purpose of having it placed at Messrs. *Glyn, Mills, Currie, & Co.* to the credit of the company, for the purpose of having a creditable balance in case of inquiries from *Berlin* bankers, but not for the general purposes of the company, such money to be returned intact at the expiration of one month. No

cheque to be drawn by the company unless countersigned by the financial secretary *pro tem.*, the company merely holding such sum as trustee for the said *J. P. Bowden*. Further, to appoint Mr. *A. E. Bunn* financial secretary *pro tem.* for two months certain without salary, or until the £1000 is repaid, but with power for the said *A. E. Bunn* to resign at seven days' notice within that period."

The £1000 was paid by *Bowden* to the credit of the company.

Subsequently the Appellant was applied to by the directors to allow sums to be drawn out from the above £1000 for the purposes of the company, and he assented to this. The greater part of it was accordingly drawn out by cheques countersigned by the above-named Mr. *A. E. Bunn*, who was one of the Appellant's solicitors, and applied for purposes not alleged to be improper, leaving a balance of £99 15*s*. It appeared that the company never had any other money to its credit than *Bowden's* £1000.

It appeared that no *Berlin* banker ever made any inquiry as to the funds of the company, and in November, 1883, a letter was received from *Berlin* which shewed that no application by any *Berlin* banker was to be expected.

On the 12th of January, 1884, an order was made for the compulsory winding-up of the company. The £99 15*s*. was then standing to the credit of the company. *Bowden* made an affidavit in opposition, in which he stated himself to be a creditor for £1350, but did not say anything as to his claim to the £99 15*s*.

Bowden claimed to prove against the company for £1350, which appeared not to include the £99 15*s*.

On the 21st of February, 1884, *Bowden* took out a summons in the winding-up to have the £99 15*s*. paid to him. The application was adjourned into Court, and on the 7th of March, 1884, Vice-Chancellor *Bacon* dismissed it with costs.

Bowden appealed, and the appeal was heard on the 7th of May, 1884.

Upjohn, for the Appellant:—

It is alleged that the deposit was made for a fraudulent purpose and therefore cannot be recovered. But the purpose for which the money was deposited failed, so as the fraud (if any) was

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only inchoate, I have a right to revoke the arrangement and have my money back so far as it has not been applied: *Symes* v. *Hughes* (1); *Taylor* v. *Bowers* (2). The drawings out must be attributed in my favour, *Knatchbull* v. *Hallett* (3), if any other moneys have been paid in, this being trust money; but on the evidence it does not appear that the company ever had any other money to its account.

Marten, Q.C., and *Ryland*, *contrà*:—

The Vice-Chancellor said that if a man puts money into the hands of the company to give it a fictitious credit that is a fraud, and he cannot then turn round and say that the money is his. As to *Symes* v. *Hughes*, nothing had occurred to prevent repudiation of the illegal agreement. Here nothing was done to repudiate it till after the commencement of the winding-up. *Taylor* v. *Bowers* is inapplicable for the same reason. *Knatchbull* v. *Hallett* does not apply, for this is a case of a fraudulent loan, not of trust. There was a fraudulent intent to deceive not only the *Berlin* bankers but the public, and this intention continued till the commencement of the winding-up which fixes the rights of the parties. The present is an attempt by a lender to be paid in full.

Upjohn, in reply:—

The commencement of the winding-up prevents any subsequent alteration in rights of property, but I say that this was my property all along. The commencement of the winding-up puts an end to the purpose for which the money was advanced, and so takes the case out of the objection that the fraud continues.

BAGGALLAY, L.J.:—

In my opinion this appeal fails. On the 21st of March, 1883, a resolution was passed by the directors in these terms. [His Lordship read the resolution.] It is not disputed that the £1000 was placed by the Appellant to the credit of the company at the bank of *Glyn & Co.* for a fraudulent purpose. But the Appellant says that the money was never applied for any fraudulent pur-

(1) Law Rep. 9 Eq. 475. (2) 1 Q. B. D. 291.
(3) 13 Ch. D. 696.

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pose, that the purpose came to an end, and that he is entitled to have the money back as being impressed with a trust in his favour. What happened was, that about £900 was drawn out pursuant to resolutions of the directors with the consent of the Appellant, for purposes which were not fraudulent, and was applied accordingly. In November last a communication was received by the directors from a person who was negotiating for them at *Berlin*, from which it appeared that no applications had been made by any *Berlin* bankers, and that none were to be expected. In the view I take of the case I think it was then open to the Appellant to say at once, "The purpose for which this money was advanced cannot be carried into effect; pay me back the balance." But the Appellant did not recall his money. It was possible, though not probable, that applications might still be received from *Berlin* bankers, and that the scheme might be carried out. The Appellant, however, did nothing to repudiate the arrangement, and so matters remained till the presentation of the petition to wind up. Then, after a winding-up order has been made, he brings forward this claim. There have been cases in which a party who has parted with his property under a fraudulent arrangement, has nevertheless been allowed to recover the property, but this case differs from them in many respects, especially in this, that there was no repudiation till after the commencement of the winding-up.

COTTON, L.J.:—

I am of opinion that the decision of the Vice-Chancellor is right. I think it the just result of the evidence that the balance now in dispute is ear-marked as part of the money which the Appellant advanced. Then the Appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall. But that declaration of trust is coupled with a statement that the advance is made in order that the company may appear to have a creditable balance at their bankers if inquiries are made—a purpose which is admitted to be fraudulent. The money was to be represented to be the money of the company, but by a private arrangement it was not to be their money. Then it is said that a person who parts with his

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property for a fraudulent purpose may repudiate the bargain and get his property back. I give no opinion whether in November last the Appellant could have done so. He did not attempt to do so, but waited till the event happened which put an end to the purpose for which the money was deposited. He left the money at the bank as long as the possibility of carrying out the illegal purpose continued, and it is now too late for him to reclaim it. Assuming that he had the right to repudiate the bargain, he has, in my opinion, lost that right.

LINDLEY, L.J.:—

I also am of opinion that the decision of the Vice-Chancellor is correct. I am not satisfied that this was not a case of loan as distinguished from trust, and if that is the true view it is fatal to the Appellant's case. But if it was a case of trust, the Appellant must shew what the trust was. He does so, and shews an illegal trust, since the purpose of the advance was to give a fictitious credit to the company. The trust at first was to last only for a month. The sum was drawn upon, and the residue was left in the hands of the company to get them credit. If the case is one of debt the Appellant is not entitled to be paid in full. Whether it was loan or trust, I think that the Appellant might have recalled the money at the end of the month. He did not do so, but left it where it was till the commencement of the winding-up. The object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up. After that I think it is too late for the Appellant to repudiate the bargain and claim the money.

Solicitors for Appellant: *Arnold E. Williams & Bunn.*
Solicitor for liquidator: *Montagu Hawkins.*

H. C. J.

PHILIPS *v.* BEALE.

C. A. 1884 May 8.

[1884 P. 388.]

Practice—Trial—Change of Venue—Action assigned to Chancery Division—Rules of Supreme Court, 1883, *Order* XXXVI., *r.* 1.

Under Order XXXVI., rule 1, a plaintiff is entitled to lay the venue of an action in any place that he pleases, although it is specially assigned to the Chancery Division, and has been commenced in that Division.

THE Defendant purchased a house which was subject to a mortgage to the Plaintiff for £600; and on the occasion of the purchase he executed, as the Plaintiff alleged, a bond in the penal sum of £1200 as a collateral security for the payment of the mortgage debt and interest.

In January, 1879, the Defendant paid £615 to Messrs. *Dodge & Phipps*, the Plaintiff's solicitors at *Liverpool*, for the purpose of paying off the mortgage, and the Plaintiff then executed, at the request of his solicitors, a reconveyance of the house to the Defendant. The money was, however, never paid to the Plaintiff, having been misappropriated by the solicitors, and in February, 1884, the Plaintiff issued the writ in this action, claiming payment of the money secured by the bond, or foreclosure and reconveyance of the house. The writ issued out of the District Registry at *Liverpool*, and the action was set down in the Chancery Division in the Court of Vice-Chancellor *Bacon*, but in the statement of claim the Plaintiff named *Liverpool* as the place of trial.

On the 24th of April the Plaintiff gave notice of trial for the 8th of May at the *Liverpool* Assizes, without a jury. On the 6th of May the Defendant applied to the Vice-Chancellor in Chambers for an order to change the venue to *London*, in order that it might be heard before the Vice-Chancellor. His Lordship made the order asked for, on the ground that the action, being for foreclosure, was specially assigned to the Chancery Division.

The Plaintiff appealed from this order.

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F. H. Mellor, for the Appellant:—

The property and the principal witnesses in this case are all in *Liverpool*. The cause would be heard at the next assizes, and great delay and expense would be saved by trying the action there. Order XXXVI., rule 1, is perfectly general and gives the right to the Plaintiff to choose the place of trial of the action. It makes no difference that this action is one of those assigned to the Chancery Division: *Warner* v. *Murdoch* (1).

Brett (*Marten*, Q.C., with him), for the Defendant:—

It was not intended by the rules that actions assigned to the Chancery Division should be tried by a jury at the assizes unless the Judge should specially order it: Order XXXVI., r. 3. The present action involves mixed questions of law and fact, and it is most convenient that it should be heard by a Judge of the Chancery Division: *Cardinall* v. *Cardinall* (2). The Judge has exercised his discretion, and the Court will not interfere except under special circumstances: *Moss* v. *Bradburn* (3); *Ruston* v. *Tobin* (4). If the action is tried at *Liverpool* the accounts will have to be taken by the District Registrar, which will not be so convenient as taking them in *London* before the Chief Clerk.

BAGGALLAY, L.J.:—

I think that the order of the Vice-Chancellor must be discharged. An application to change the venue in an action just going to be tried is, generally speaking, too late. The delay is in itself a sufficient reason for refusing the application, and the Defendant has shewn no ground for changing the venue. The appeal must, therefore, be allowed.

COTTON, L.J.:—

I agree. The words of the order referred to are precise. I can see no good ground for changing the venue. On the contrary great delay would be caused. The Judge has a discretion, but it is a discretion which may be appealed from.

(1) 4 Ch. D. 750.
(2) 25 Ch. D. 772.
(3) 32 W. R. 368.
(4) 10 Ch. D. 558.

LINDLEY, L.J. :—

I am of the same opinion. This is a case of considerable importance, for the question is whether a cause assigned to the Chancery Division ought to be tried at the assizes. The rule which governs this case, Order XXXVI., rule 1, is quite recent, and applies to every action, whether assigned to the Chancery Division or not. The order says that every action in every Division shall, unless the Court or a Judge otherwise orders, be tried in the county or place named in the statement of claim, or where no statement of claim has been delivered or required, by a notice in writing to be served on the defendant or his solicitor. The Plaintiff has, therefore, the right to place the venue where he pleases, subject to the order of the Court if it should think it expedient to change the venue. In this case the Vice-Chancellor has not based his order on convenience or the place of residence of the witnesses, but has changed the venue because the action is one which is attached to the Chancery Division. In my opinion that is not a sufficient reason for changing the venue, and is opposed to the provisions of Order XXXVI., rule 1.

Solicitors: *Chester & Co.*, agents for *Gill & Archer, Liverpool; G. L. P. Eyre & Co.*, agents for *Garnett & Tarbet, Liverpool.*

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March 15, 22; April 7.

In re ASPHALTIC WOOD PAVEMENT COMPANY.

LEE & CHAPMAN'S CASE.

Running Contract—Charge on Moneys payable under the Contract—Winding-up of contracting Company—Set-off—Salvage Money—Moneys payable under concurrent Contracts—Notice.

By the terms of a contract between the Commissioners of Sewers and a wood paving company, the company were to pave a particular street, and the Commissioners were to pay 60 per cent. of the moneys due a month after the engineer certified the works to be complete; 30 per cent. within three months afterwards; and 10 per cent. at the expiration of two years. During the two years the company were to keep the wood surface of the roadway in repair, and if, before the expiration of the two years, the Commissioners should give them notice, the company were also to keep the roadway in repair for fifteen years upon being paid for the same at the annual rate of 6*d.* per square yard. The Commissioners were to be at liberty to retain from time to time "out of any money payable by them to the contractors," an amount equal to the above annual charge, by way of security; and in the event of failure by the company to perform the contract, the moneys retained were to be forfeited, and to be held by the Commissioners as liquidated damages for the default; and it was provided that whenever "according to the terms of this contract," any money should be due from the company to the Commissioners for damages or otherwise, the Commissioners might either sue for such money or deduct or set off the same against any money due from them to the company.

The contract being dated on the 22nd of September, 1882, the company, on the 15th of November, 1882, gave to *L. & C.*, timber-merchants, a charge on all their interest in the contract to secure a debt for goods sold and delivered; and on the 9th of December, 1882, notice of this charge was given to the Commissioners.

On the same 9th of December, 1882, but after the notice, the company presented a petition for a winding-up order, and on the 12th and 16th of December the provisional official liquidator was empowered and ordered to complete the contract and to obtain the necessary timber on security of the moneys to be received subject to *L. & C.'s* charge. On the 13th of January, 1883, the winding-up order was made: on the 29th of January the liquidator, having completed the work, sent in a claim to the Commissioners, and on the 8th of March, 1883, the engineer certified the work to be complete. On the 19th of March, 1883, the Commissioners sent to the liquidator the engineer's certificate and a claim of set-off for anticipated loss by breach of the contract to repair for fifteen years, the amount of such claim being estimated by the difference between 1*s.* a square yard, which the Commissioners considered they would have to pay for the repairs, and the 6*d.* a square yard provided for by the agreement. They also claimed to set off

damages accrued and anticipated under other contracts for paving other streets. Except as to a trifling sum, it was not alleged that any cause of action for breach of any of these contracts accrued before the 27th of January, 1883. On the 25th of May, 1883, the Commissioners served the company (in liquidation) with formal notice to repair for fifteen years from the 8th of March, 1885.

Held, that the liquidator was entitled to a first charge on the moneys payable under the contract for the cost of completing the work incurred by him since the winding-up:

Held, further, that the chargees, *L. & C.*, were entitled to a charge on 90 per cent. of the moneys payable under the contract (subject as above) undiminished by any retainer or set-off by the Commissioners either under the *Victoria Street* contract or otherwise:

Held, further, that the Commissioners were entitled to retain the 10 per cent. pursuant to their contract and might prove for their cross claim under the contract of the 22nd of September, 1882:

Held, further, that the Commissioners were not entitled to retain any moneys due under the contract of the 22nd of September, 1882, in respect of moneys due under any of the concurrent contracts:

Held, further, that the winding-up did away with the necessity of giving the notice to repair for fifteen years required by the contract.

ADJOURNED SUMMONS.

On the 22nd of September, 1882, an agreement was entered into between the *Asphaltic Wood Pavement Company, Limited*, of the one part, and the *Commissioners of Sewers of the City of London* of the other part, for the pavement by the company of *Queen Victoria Street*. The following were amongst the clauses of the contract:—

"11. The contractors shall finish the paving . . . within three months from the time when the ground shall be given up to the contractors . . .

"12. No payment . . . shall be made . . . until the engineer shall have certified that the contractors have completed and finished the paving . . .

"13. The contract price for the . . . work shall, subject to the rights of retainer mentioned in clause 18 . . . be paid as follows: 60 per cent. within one calendar month after the engineer shall have given the certificate . . . and shall have certified the amount of such contract price; a further 30 per cent. within . . three calendar months succeeding such last mentioned payment; and the remaining 10 per cent. at the expiration of two years from the date of the certified completion of the work.

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"14. The contractors shall . . . at their own expense, maintain, keep, and preserve the wood surface of the said roadway . . . in a perfect state of repair, to the satisfaction of the engineer, for . . . two years . . . from the date of the certificate of the engineer.

"15. From and after the expiration of the two years mentioned in clause 14 . . . if the Commissioners shall by notice in writing to the contractors . . . at any time before the expiration of such two years so require, the contractors shall at their own cost and expense repair and maintain in a perfect state of repair, and to the satisfaction of the engineer, the said roadway . . . for the period of fifteen years . . . for the consideration . . . that the Commissioners shall pay the contractors for such repairs an annual sum . . . at the rate of sixpence per . . . square yard."

"17. If the Commissioners shall not give the notice mentioned in clause 15 . . . then, for the period of fifteen years after the expiration of the two years mentioned in clause 14 . . . the contractors shall execute and do all such repairs as the Commissioners shall direct by writing under the hand of the engineer at the prices hereinafter mentioned"—(specifying the prices).

"18. Notwithstanding any provision for payment of money to the contractors, the Commissioners may retain from time to time out of any money payable by them to the contractors, an amount equal to such annual sum as is mentioned in clause 15, by way of security for the due performance by the contractors of the repairs undertaken and to be performed by them under such clause; and, in the event of any failure by the contractors to perform such repairs . . . the moneys so retained by the Commissioners shall be forfeited by the contractors, and held by the Commissioners as and for liquidated damages in respect of any such default, and especially the right of retainer given by this present clause shall extend so far as necessary over the moneys included in the last 10 per cent. of the contract price made payable under clause 13 of this contract."

"33. If the contractors shall for the space of forty-eight hours after receiving instructions from the engineer, fail to commence, or having commenced, shall fail to proceed diligently with, any works within this contract which they have been directed by the engineer to proceed with, or shall neglect, fail, or refuse to amend

any of the work which in the opinion of the engineer they may have improperly executed, or shall fail to complete the works or any of them at the time hereby appointed for the completion thereof, or within such extended time (if any) as may be allowed by the engineer under clause 11, or to maintain the pavement in accordance with this contract during the contract term, it shall be lawful for the Commissioners, and they are hereby authorized, themselves to do, or repair, or amend the works or any part thereof which may be the subject of such neglect, failure, or refusal . . . or . . . employ other persons to do and perform any work the subject of such neglect, failure, or refusal . . . and all loss or extra expense that the Commissioners may incur . . . shall be borne by the contractors . . . ."

"39. Whenever according to the terms of this contract any money shall be due from the contractors to the Commissioners either for damages or work under clause 33, or otherwise, the Commissioners may either sue the contractors for such money or any part thereof, or may deduct and set off the same or any part thereof from or against any money which may then be or may thereafter become payable by the Commissioners to the contractors."

With respect to part of the case, it is material to state that at this date there were running four other similar contracts between the same parties—one dated the 10th of August, 1875, for paving the Barbican; a second dated the 20th of June, 1876, for paving St. Bride Street and Queen Street; a third dated the 6th of June, 1877, for paving the Old Bailey; and a fourth dated the 17th of July, 1877, for paving Fleet Street. Each of these contracts contained a clause similar to clause 18 above stated, including the words "may retain from time to time out of any money payable by them to the contractors." The works under these contracts had been completed, but the company was still under liability in respect of the repairs for fifteen years.

By a letter dated the 15th of November, 1882, the company gave to the applicants, Messrs. *Lee & Chapman*, timber merchants, a charge upon "all their interest in" the contract of the 22nd of September, 1882, to secure a debt of £1900 due by the company to the applicants.

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On the 9th of December, 1882, notice of this charge was given by *Lee & Chapman* to the Commissioners of Sewers.

On the same 9th of December, 1882, but after the notice, a petition was filed by the company for a winding-up order, and on the 12th of December, 1882, the provisional official liquidator was empowered and ordered by the Court to complete the contract of the 22nd of September, 1882.

By another order dated the 16th of December, 1882, it was ordered that the applicant (*i.e.*, the liquidator) be at liberty to complete the paving under the contract of the 22nd of September, 1882, and that he be at liberty to expend all necessary moneys for wages and materials and incidental expenses necessary for completing such contract; and it was ordered that the necessary timber for completing such contract might be taken on the security of the moneys to be received under the said contract when completed, subject to any prior charge given by the said company to Messrs. *Lee & Chapman*, of No. 80, *King William Street*, in the city of *London*, timber merchants, for timber already supplied by them to the said company for the said contract.

On the 13th of January, 1883, the company was ordered to be wound up.

On the 27th of January, 1883, the Commissioners sent to the company a notice to take up all defective pavement and to restore to a proper condition the carriage-way pavement of Old Bailey, laid by them in 1877, and giving them further notice that if within forty-eight hours the work were not put in hand, the Commissioners would employ other contractors to do the work, as empowered by the contract, and would seek to recover any expense they might so incur. On the same day another similar notice was sent with reference to the Fleet Street contract.

On the 29th of January, 1883, the official liquidator, having completed the Queen Victoria Street contract, forwarded to the engineer of the Commissioners an account of measurement, and a claim for £2874 14*s.* 10*d.* in respect of work done.

On the 8th of March, 1883, the engineer of the Commissioners certified that the work was complete. (The period of two years after this date would expire on the 8th of March, 1885, and fifteen years after that, on the 8th of March, 1900.)

On the 19th of March, 1883, the Commissioners sent in a claim to the liquidator for £2536 17*s.* 6*d.* for breach by the company to maintain and keep in repair the roadway in Queen Victoria Street (6765 yards) for fifteen years, and gave him notice that they intended to retain "all moneys due from them to the company" in respect of such claim. [This amount was arrived at by subtracting from the 1*s.* a yard which the Commissioners had agreed to give to another contractor, the 6*d.* a yard for which the company had agreed to do the same work.] They also claimed to set off other large sums in respect of actual and anticipated defaults by the company under the other contracts.

On the 25th of May, 1883, the Commissioners served the company with a formal notice that they required the company to repair and maintain the roadway of Queen Victoria Street for the further period of fifteen years after the first two years, in accordance with the terms of the contract.

On the 15th of February, 1884, the Chief Clerk certified that the results of the adjudication upon debts and claims against the company brought in pursuant to the advertisements were as follows:—

To the Commissioners of Sewers he found that there was due for liquidated damages under the five above-mentioned contracts, the sum of £5843 11*s.* 6*d.*; also that the amount of retention money in the hands of the Commissioners at the date of the winding-up order amounted, as to the four last named contracts, to £944 19*s.* 4*d.*, and that the amount of the company's claim against the Commissioners under the contract of the 22nd of September, 1882, was £2874 14*s.* 10*d.* These two last sums, amounting to £3819 14*s.* 2*d.*, subtracted from £5843 11*s.* 6*d.*, left a balance due to the Commissioners from the company of £2023 17*s.* 4*d.*

He also found due to Messrs. *Lee & Chapman* a sum of £1908 8*s.* 2*d.* for principal and interest, but declined to give them any priority over the set-off of the Commissioners.

Lee & Chapman took out a summons to vary this certificate, as follows:—1. That they might be declared entitled, in priority to any right of set-off of the Commissioners, to a charge on the sum of £2874 14*s.* 10*d.*; and further, that as between the Commis-

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sioners and the applicants it might be declared (1) that no set-off be allowed for any debt or damage claimed by the Commissioners against the company in respect of any contract other than the *Queen Victoria Street* contract; (2) that no set-off be allowed for any debt or damages claimed by the Commissioners against the company under the *Queen Victoria Street* contract unless the same had accrued by breach of such contract prior to the 9th of December, 1882; (3), that no set-off be allowed of any damages which were unliquidated on the 9th of December, 1882.

The official liquidator also took out a summons to vary the certificate, (1) by disallowing from the admitted claim of £5843 11*s.* 6*d.* the sum of £2536 17*s.* 6*d.*, being the sum allowed for loss by non-fulfilment of the contract, dated the 22nd of September, 1882, to maintain *Queen Victoria Street*; and (2) that out of the sum of £2874 14*s.* 10*d.* allowed to the Commissioners to set off and retain, the sum of £740 15*s.* 7*d.* might be paid to the applicant, being the amount expended by him in completing the contract of the 22nd of September, 1882, pursuant to the orders of the Court.

Hemming, Q.C., for the summons of Messrs. *Lee & Chapman*:—

If we establish that the set-off allowed by the Chief Clerk is not a good set-off as between the Commissioners and the company, our application must succeed as a necessary consequence; but we say that, in any event, whether the set-off be good or bad as against the company, it is bad as between the Commissioners and the applicants, as from the 9th of December, 1882, when the Commissioners received notice of *Lee & Chapman's* charge.

The set-off allowed by the Chief Clerk under the *Queen Victoria Street* contract is in respect of damages for breach of a contract to repair for fifteen years which did not exist before the 25th of May, 1883, and which if it had existed had never come into operation, and had not been and could not have been broken. But it is quite clear that the Commissioners could not, and cannot, set off any sum against the company's claim before a right of action on the part of the Commissioners arose, and as against us they could set-off nothing in respect of any breach which had not been committed on the 9th of December, 1882.

On the 13th of January, 1883, when the company was ordered to be wound up, there was, no doubt, a liability under the two years' contract to repair, during which period the 10 per cent. was to be retained unpaid, but no breach even of that, and as to the fifteen years' contract to repair, in any view of the case, no cause of action which could possibly arise until the notice of the 25th of May, 1883, was served, and a breach committed under it.

If *A.* owes a debt to *B.*, and *B.* makes an equitable assignment of it to *C.*, and *B.* (after notice by *C.* to *A.*) becomes subject to an independent liability to *A.*, *A.* cannot set off the liability as against the debt in priority to *C.*: *Roxburghe* v. *Cox* (1); *Brice* v. *Bannister* (2); *Ex parte Hall* (3); *Watson* v. *Mid-Wales Railway Company* (4). The critical time is the date when notice is given to the person liable to pay. In no case will a set-off be allowed against a claim for a present debt merely upon shewing that there may be, or that there will be, a future debt. The authority for this proposition at law, is *Evans* v. *Prosser* (5); in equity, *Smith, Fleming, & Co.'s Case* (6); in bankruptcy, *Ex parte Price* (7); and in winding up, *In re Milan Tramways Company* (8); *Ince Hall Rolling Mills Company* v. *Douglas Forge Company* (9). Hence the claim to set off damages, real or imaginary, under the other four contracts which the Chief Clerk has allowed is out of the question, except as to a sum not worth considering for some trifling neglect which may have occurred before the 9th of December.

R. Horton Smith, Q.C., and *C. H. Turner*, for the official liquidator:—

Our summons is not quite so wide as the last.

Except as to one point, if *Lee & Chapman* succeed in shewing that no set-off is allowable after the 9th of December, 1882, as between the Commissioners and the company, our object will be gained, as this is what we seek to establish.

We ask that the £5843 11*s.* 6*d.* may be reduced by £2536 17*s.* 6*d.*

(1) 17 Ch. D. 520.
(2) 3 Q. B. D. 569.
(3) 10 Ch. D. 615.
(4) Law Rep. 2 C. P. 593.
(5) 3 T. R. 186.
(6) Law Rep. 1 Ch. 538.
(7) Ibid. 10 Ch. 648.
(8) 22 Ch. D. 122; 25 Ch. D. 587.
(9) 8 Q. B. D. 179.

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to £3306 14*s.* 0*d.*; and in addition to the argument addressed to the Court on behalf of *Lee & Chapman*, we further say that until notice given under clause 15 of the contract no cause of action and no claim did or could arise; and we further say that the notice of the 25th of May, 1883, was a nullity. After a winding-up order, no valid notice can be served on a company: *Ince Hall Rolling Mills Company* v. *Douglas Forge Company* (1); *In re Wreck Recovery and Salvage Company* (2); *Ex parte Emmanuel* (3).

The other point is as to the £740 15*s.* 7*d.* laid out by the liquidator in completing the contract, to which he is entitled, as salvage, in priority to every other payment: *Ince Hall Rolling Mills Company* v. *Douglas Forge Company*; *Mersey Steel and Iron Company* v. *Naylor* (4).

Marten, Q.C., and *John Henderson*, for the Commissioners of Sewers:—

Besides the *Queen Victoria Street* there were four other contracts, under each of which we were entitled to retain "out of any money payable by" us to the contractor; the language of clause 18 being common to all the other contracts. Accordingly we claim a right to retain paramount to *Lee & Chapman's* claim.

No money became payable to the company by us under the *Queen Victoria Street* contract until the 8th of April, 1883, when the 60 per cent. became payable. There is no absurdity in supposing that the company in 1882 were willing to make the *Queen Victoria Street* contract subject to detainer for all future defaults under other contracts, because the company never expected to make any default. On the 9th of December, 1882, there was a liability to the Commissioners on the part of the company under all the contracts.

An assignee of a contract can take only subject to the equities which attach to that contract: *Morris* v. *Livie* (5).

[The Vice-Chancellor:—It is not necessary to cite cases for that proposition.]

(1) 8 Q. B. D. 179.
(2) 15 Ch. D. 353.
(3) 17 Ch. D. 35.
(4) 9 Q. B. D. 648; since reported on appeal 9 App. Cas. 434.
(5) Y. & C. (Ch.) 380.

In *Shaw* v. *Foster* (1) it was held that such notice (as was there given) to the vendor that the purchaser has agreed to assign the contract will not compel the vendor to refuse execution of a conveyance to the purchaser. Unliquidated damages may be the subject of set-off: *Young* v. *Kitchin* (2).

The company committed a breach at the date of the winding-up; at that date they repudiated their contract; and accordingly we thereupon became entitled to prove for estimated damages and to set off the amount: *In re Trent and Humber Company* (3); *Companies Act*, 1862, s. 158: *Booth* v. *Hutchinson* (4); *Ebbw Vale Company's Claim* (5); *Cook's Policy* (6); *Macfarlane's Claim* (7).

The winding-up converted the liabilities under all the contracts, including the *Queen Victoria Street* contract, into immediate claims, and for these amounts the Commissioners are entitled to a set-off: *In re Bridges* (8).

BACON, V.-C.:—

The main thing to be considered is the effect of the contract of September, 1882. That there were other contracts between the contractors and the Commissioners can have nothing to do with the construction of this contract. The contract recites that the Commissioners are desirous of having the roadway in *Queen Victoria Street* paved with wood, and kept in repair as thereinafter stipulated, and that the contractors had agreed to execute such pavements and all other works and such repairs as were thereinafter mentioned. Then there are a number of clauses, to which I need not refer more particularly; that upon which the whole question turns is the 39th. [His Lordship read clause 39 above, and continued:—] The words are whenever "under the terms of this contract." There is no mention of any other contract; no reference to contracts for paving the *Barbican*, or *Fleet Street*, or any other street, but upon this contract the agreement between the parties is, "If you do the work specified, you shall

(1) Law Rep. 5 H. L. 321.
(2) 3 Ex. D. 127.
(3) Law Rep. 6 Eq. 396, 399, n.; 4 Ch. 112.
(4) Law Rep. 15 Eq. 30.
(5) Ibid. 8 Eq. 14.
(6) Ibid. 9 Eq. 703.
(7) 17 Ch. D. 337.
(8) 17 Ch. D. 342.

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be paid at a rate to be fixed." The work is done; it is completed, it is true, as to part of it, after the winding-up order, when the company were not able to do it themselves; but they did it by means of the advance of money by the liquidator, who paid the money in order that the price of the work that was done might be received by him. What word can I find in this contract which relates to any other than the existing contract, or which gives to the Commissioners a right to set off? In my opinion there is no right to set-off. At the time when the winding-up order was made, which paralysed all the efforts and exertions of the company, the work was incomplete. Before that, in order to do the work, the company got goods sold to them by Messrs. *Lee & Chapman*, and gave them a charge on the money which should be due in respect of this contract under the very words "according to the terms of this contract;" and they gave a charge, the validity of which no one has disputed. If at the time of the winding-up the company had entirely suspended its operations, Messrs. *Lee & Chapman* never could have got anything. But the official liquidator, acting under the orders of the Court, and for the benefit of all the creditors, does complete the contract, so that the money becomes payable under the certificate of the surveyor.

The multitude of cases which have been referred to have really no application to the facts before me, because what I am called upon to decide is, whether there is any right of retainer in respect of matters wholly foreign to and wholly distinct from the contract of September, 1882. How can I say this is so? Here is a plain bargain: "If I do the work for you you shall pay me; but you shall not be liable to pay me until a certain certificate is made by the surveyor that the money has been earned." Now the attempt on the part of the Commissioners is to say, "We had other contracts, each of which contains a right to retain"—probably in the same terms as this—"from time to time whenever money may be payable by us to the contractors." I am unable to connect one contract with the others, or to say, whatever may have been the rights of the Commissioners under the other contracts, that those rights exempt the Commissioners from the

obligation to pay what the certificate of the engineer decides to be due. That is really the whole question before me.

I was under the impression at one moment that Messrs. *Lee & Chapman* had damaged their right by tendering a proof in the winding-up; but looking at the proof which has been handed up to me, I see it is protected against that, because it does state the security that they held and the possibility of the claim which they made being reduced.

I quite agree with what Mr. *Marten* has said, that an assignor can assign no more than he has. What he has under this contract is the right to receive money when the certificate of the engineer has been furnished. If anything remained to be done, and if there was a failure made by the contractors, as after the winding-up order they must have failed, then there would be a clear right on the part of the Commissioners in respect of any damage they had sustained, either under the four other contracts or by reason of any breach under this contract, to prove for unliquidated damages. That is not what they have sought to do. What they have set up in their statement is, that they have spent a certain sum of money; they estimate how much more it would cost to keep the road in repair for fifteen years, the whole of which may be capable of dispute or answer when they come to prove their claim, and they ask that they may be allowed to retain that themselves, they having notice of *Lee & Chapman's* charge, and having made no objection to it, and there being no suggestion that *Lee & Chapman* had not got this charge in their hands at the time they served the notice. As to the right to set off, receipt of the notice, in my opinion, would have precluded the Commissioners from saying that they were to tack anything else on to the terms of this contract. The money payable under the contract is the subject of the agreement between the parties. The charge is upon the money so payable, and, in my opinion, *Lee & Chapman* have a charge for the sum mentioned. The Commissioners are not entitled to set off, but they have a right to prove, as unliquidated damages, for any damage which they may have sustained. The payment made by the official liquidator is a payment made by the Court. It is made for the benefit of all the creditors. It is made in order that the

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contract may be performed. Performed it has been, and the money has become due. The official liquidator, therefore, will be entitled to reimburse himself the money which under the order of the Court he had paid in order to complete the contract, and to entitle him to the receipt of the money.

Horton Smith:—Does your Lordship hold that the notice to the liquidator of the 25th of May, 1883, was a valid notice?

Bacon, V.C.:—The winding-up dispenses with all necessity for notice. The winding-up order overrides all that. The Commissioners will be at liberty to prove in respect of the breach of contract to repair for the fifteen years.

The following are minutes of the order:—

The Court being of opinion that the Commissioners are not entitled to set off any of the £2587 5*s.* 4*d.* (being the £2874 14*s.* 10*d.*, certified to be due from them to the company under the contract of the 22nd of September, 1882, less the £287 9*s.* 6*d.*, £10 per cent. thereon, to be retained according to the provisions of the said contract);

Order the Commissioners to pay to the official liquidator the sum of £740 15*s.* 7*d.*, expended by him in completing the works under the contract; and do thereout pay the sum of £1846 9*s.* 9*d.*, the balance thereof, in part payment of the sum due to Messrs. *Lee & Chapman* in respect of their equitable assignment of the amount due on the said contract; Messrs. *Lee & Chapman* to be at liberty to add the taxed costs of these applications to their security; the Commissioners to be at liberty to prove against the company for a sum not exceeding £2536 17*s.* 6*d.*, in respect of the non-fulfilment of the said contract of the 22nd of September, 1882; the certificate to be varied accordingly; the costs of the liquidator and the Commissioners of both applications to be taxed and paid out of the assets of the company.

Solicitors: *Halse, Trustram, & Co.; W. H. Smith & Son; E. A. Baylis.*

J. B. D.

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April 7, 9.

[1882 A. 826.]

Book of Words for use in Telegraphy—Copyright—Telegraphic Code compiled from the Words for use of Agents—Infringement of Copyright—Injunction.

The Plaintiff published "*The Standard Telegram Code*," a book of words selected from eight languages, for use in telegraphic transmissions of messages, and it was accompanied by figure cyphers for reference or private interpretation. The book was registered under the *Copyright Act*, 5 & 6 Vict. c. 45. The Defendants bought a copy of the book, and compiled for their own use with its aid a new and independent work, as alleged, which was their own private telegraph code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their book for sale or exportation:—

Held, that the Defendants had infringed the copyright of the Plaintiff, and that a perpetual injunction must be granted.

GEORGE AGER, the Plaintiff, published in the year 1879 a book consisting of about 100,000 words (from "Aafsch" to "Travail"), arranged alphabetically and selected from eight languages, and in every other respect in conformity with the rules sanctioned by the *London* Telegraph Conference of 1880. The book was entitled "*The Standard Telegram Code*"; it was specially compiled with a view to correct telegraphic transmissions, and it was accompanied by figure cyphers for reference or private interpretation. On the 26th of November, 1879, the Plaintiff entered his book in the registry at *Stationers' Hall* pursuant to the provisions of the statute 5 & 6 Vict. c. 45. Shortly before the date of the writ in the action, 22nd of May, 1882, the Plaintiff discovered that the Defendants had without his consent wrongfully printed books consisting of copies of his book, having opposite to the words or some of them the meaning to be attached to them when used by the Defendants and their agents; and that they had distributed many of their books among their numerous establishments and agents at home and abroad.

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The Plaintiff alleged that the Defendants had prevented him from selling a large number of copies of his book, and that his profits from his copyright had been thereby seriously diminished. The action was for an injunction to restrain the Defendants, their managers, agents and servants, from printing, distributing, or otherwise disposing of any copies of their book; for an account of the copies of the book which the Defendants had printed and distributed, or remaining in their possession; for delivery to the Plaintiff of the copies on hand undistributed; for damages, and for costs.

The Defendants in their statement of defence, delivered the 28th of July, 1882, stated that it was not the fact that they had printed a book consisting of a copy, or substantially so, of "*The Standard Telegram Code*," but that they bought a copy of the Plaintiff's book and compiled for their own use with its aid, a new and independent work which was their own private telegraph code, and they had printed in it a considerable number of words selected from the words used in "*The Standard Telegram Code*," together with divers words derived from other sources by them, there being set opposite to the words in their code figure cyphers substantially different from those used in the Plaintiff's book, as also were the meanings to be attached to such words when used by the Defendants and their agents. They said that they had distributed about sixty copies of their telegraph code among their own private establishments and agents at home and abroad. In making use of "*The Standard Telegram Code*," as they had done, the Defendants said that they had so made use of it for the precise purpose for which it was intended by the Plaintiff when he sold them a copy, and for no other purpose, and that the book was not useful or available for any other, and, regard being had to the object with which the book was sold to them they had only made such extracts therefrom as were, under all the circumstances of the case, reasonable in quantity and quality. They had not printed the Plaintiff's book or their own either for sale or exportation within the meaning of the statute 5 & 6 Vict. c. 45, and they denied that they had prevented the Plaintiff from selling copies of his book; that his profits had been diminished; that they had any copies of their book in their possession or under

their control; and that they had printed any book in infringement of any copyright of the Plaintiff.

Rigby, Q.C., *Warmington*, Q.C., and *J. R. Brooke*, for the Plaintiff, moved for a perpetual injunction, and asked for the relief claimed. They referred to the cases of *Novello* v. *Sudlow* (1), *Alexander* v. *Mackenzie* (2), and to *Goodson* v. *Richardson* (3), though not *in pari materia*.

Glasse, Q.C., *H. A Giffard*, Q.C., and *W. Latham*, for the Defendants, referred to the statute 5 & 6 Vict. c. 45, s. 15, and to the cases of *Spiers* v. *Brown* (4), *Kelly* v. *Morris* (5), *Jefferys* v. *Boosey* (6), and *Scott* v. *Stanford* (7), and submitted that though the book of the Plaintiff might be copyright, the words in it were not; that no meaning was attached to the words except by communication with the agents of the Defendants, whose book was private, and so marked on the covers. The Defendants had made only a fair use of the Plaintiff's book, which they, for the sum of five guineas, purchased, and of the information therein, and they had in their book by the exercise of their own ingenuity and mental operations affixed to the words their own meanings, as their private code, for the sole purposes of themselves. That was a legitimate purpose. The Plaintiff's book was published for the purpose of being used, as the Defendants had applied it, for telegraphic communications. They had not exported their book for sale or for profit, but for use by their agents, and the Plaintiff was not entitled to the relief which he claimed.

Further facts and arguments will be found in the judgment.

April 9. KAY, J.:—

The facts of this case are peculiar, but I do not think there is much difficulty in applying to them the well known principles of law.

The Plaintiff sues to restrain infringement of his copyright in a book, and for damages and consequential relief.

(1) 12 C. B. 177.
(2) 9 Court Ses. Cas. (2nd Series), 748.
(3) Law Rep. 9 Ch. 221.
(4) 6 W. R. 352.
(5) Law Rep. 1 Eq. 697.
(6) 4 H. L. C. 815.
(7) Law Rep. 3 Eq. 718.

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The Plaintiff's copyright is admitted, but the infringement is denied. It appears that the book is a collection of words for use in telegraphy. One of the systems of electric telegraphy most commonly employed is that in which every letter of the alphabet is expressed by a dot or a line, or different combinations of dots and lines. In using this system it was found that mistakes frequently occur in words containing particular sequences of letters, which are expressed by dots and dashes, whose meaning differs according to the place where the slight pause between each letter is made, so that an error or insufficient indication of the pause would alter the spelling. Accordingly it was important to avoid the use of such words, and the Plaintiff's book, consisting of a careful collection of 100,000 words, is a selection from eight languages, so as to be least liable to that sort of error. To each word is ascribed a different combination of five of the ordinary numerals, 0 to 9. The price of the book is, I understand, five guineas. It can be used by any one who desires to make a code of cypher telegraphy of his own, by attributing to any of these words or to the equivalent numerals whatever meanings he may please, and communicating these significations to his correspondents; and thus a telegraphic code is established in which errors are avoided by the elimination of all words liable to occasion telegraphic mistakes.

The Defendants have invented such a code, and have availed themselves of the Plaintiff's book very largely; but instead of printing their code of signals separately, as an adjunct to the Plaintiff's book, the Defendants have printed in their own book the bulk of the words from the Plaintiff's book, appending to them numbers and meanings of their own. The result of this is that any one obtaining a copy of the Defendants' book could take from it nearly all the words selected by the Plaintiff as convenient telegraphic words without ever seeing the Plaintiff's book. The Defendants admit that they could not sell or even distribute gratuitously their book to any one who might wish to have it without infringing the Plaintiff's copyright. But they do not do this. What they do is to give—not sell—their book, and only to their own agents and to merchants with whom they correspond by telegraph, and for this purpose they have printed about 150 copies, and have distributed about fifty at present.

I have no doubt—indeed that is scarcely denied—that enough of the Plaintiff's book has been copied to constitute a serious invasion of his rights unless the Defendants can justify the manner in which they took it.

One justification attempted is the circumstance that they only give the books to their own agents and correspondents, and do not publish or use them otherwise than privately; and they point to the word "Private" printed conspicuously on the cover, and to the fact that their object would be defeated if their code were made public, as sufficiently shewing that it is out of the question that they make any public use of the Plaintiff's book.

But copyright is the right, by printing or otherwise, to multiply copies. To multiply copies of a material portion of a work which is entitled to copyright is as much a breach of the law, though differing in degree, as to multiply copies of the whole work. And it has long been settled that multiplying copies for private distribution among a limited class of persons is just as illegal as if it were done for the purpose of sale. Take for example a valuable copyright like Lord Tennyson's poems. No one can print them and distribute the copies among his friends or among the boys at a school or any limited class of persons any more than he can print them for sale: *Novello* v. *Sudlow* (1).

Therefore I have no hesitation in saying that the circumstance that the Defendants do not sell their books, but only give them to their own agents and to merchants with whom they correspond, does not justify this multiplication of copies. But the Defendants' main argument was that in making this use of the Plaintiff's book they were doing no more than the Plaintiff intended they should do: and Mr. *Giffard* ingeniously compared the case to that of a copybook with the usual slips printed at the top of each page. These are intended to be copied, and he argued that if any one bought a book he might fill it up, and as many blank books besides as he chose, with fac simile copies, if he could make them, in handwriting, without infringing the owner's copyright; because that sort of use was intended by the owner. But the question is whether the use made in this case by the Defendants was intended by the Plaintiff. By bringing this

(1) 12 C. B. 177.

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action he declares it was not. He has printed on the title-page of his book the usual intimation in a work intended to have copyright that it is entered at *Stationers' Hall*. Is there anything in the nature of the case which makes it necessary or proper to infer that his contention is wrong? In the first place the use the Defendants are making of his book is not absolutely essential even to the Defendants' mode of availing themselves of the Plaintiff's research. They might print their own code referring to the words or numbers in the Plaintiff's book without reprinting one of such words, so that any one having a copy of the Plaintiff's book, and placing the Defendants' code beside it, might employ that code with little, if any, trouble more than is involved in the use of the Defendants' book. While the advantage to the Plaintiff would be that which he must be very blind to his own interest if he intended to give up, viz., that so many more copies of his book must be bought. On the other hand, if the Defendants be right, any one to whom they give one of their books could from it, without betraying any secret of the Defendants, inform the whole world what were the words selected by the Plaintiff, and thus render his book comparatively useless. In the illustration of the copybook it was not denied that no one could print a copy even for private use. It can only be copied in the mode and to the extent intended by the owner. Copying to a certain extent is the very object which the owner of the copybook intended, but any copying beyond that extent would be illegal. The illustration is inapt unless it be clear that such copying as the Defendants have made was intended by the Plaintiff, and I have no difficulty in believing that he never intended anything of the kind.

Applying the usual test (*Scott* v. *Stanford* (1), *Kelly* v. *Morris* (2)), it seems to me that the Plaintiff must have expended a great deal of time and labour in this compilation, that what the Defendants are doing is to avail themselves very largely and unnecessarily of the labour and research of the Plaintiff without adequately recompensing him, that the use which the Defendants make of their book is calculated to interfere seriously with the sale of the Plaintiff's book, that it is a multiplying of

(1) Law Rep. 3 Eq. 718. (2) Law Rep. 1 Eq. 697.

copies of the Plaintiff's book, within the words of the *Copyright Act* (5 & 6 Vict. c. 45), and that it is therefore an invasion of the copyright of the Plaintiff against which he is entitled to be protected. Judgment must be given for a perpetual injunction to restrain the Defendants from printing or distributing any more copies of their book; those still remaining in their possession must be delivered up, and the Plaintiff is entitled to an inquiry what damages, if any, he has suffered by the distribution of such as the Defendants have parted with, and cannot recover and deliver up to him, and the Defendants must pay the costs of the action.

Solicitors: *W. Gordon; Freshfields & Williams.*

T. F. M.

CHITTY, J.

1884

March 27:
April 8.

HARVEY *v.* HARVEY.

[1881 H. 5121.]

Delivery up of Deeds—Non-compliance with Order for—Contempt—Writ of Attachment—Sheriff—Execution of Writ—Breaking open Outer Door.

Where a writ of attachment has issued against a party to an action for contempt of Court in non-compliance with an order for the delivery over of deeds and documents, the officer charged with the execution of the writ may break open the outer door of the house in order to execute it.

Burdett v. *Abbot* (1) and *In re Freston* (2) discussed.

By an order dated the 13th of July, 1883, it was ordered that the Defendant *Henry Gordon Harvey* should within seven days after service of the order deliver over to the Plaintiff *Thomas Harvey* or his solicitors a certain engrossed conveyance, as directed by the award of an arbitrator, made under the terms of the compromise, the subject of the action, and all deeds, documents, and papers in the custody, possession, or power of *H. G. Harvey*, or in any way under his control.

The Defendant *H. G. Harvey* not having complied with the order, it was by an order dated the 15th of August, 1883, ordered that the Plaintiff *Thomas Harvey* should be at liberty to issue a writ of attachment against the Defendant *H. G. Harvey*, for his contempt in not having complied with the order of the 13th of July, 1883.

On the 27th of August, 1883, a writ of attachment was issued in pursuance of the order, and was delivered at the office of the under-sheriff for the county of *Kent*, the Defendant *H. G. Harvey* being then residing at *Dover*, in the county of *Kent*.

The Defendant *H. G. Harvey* having kept within doors after the writ of attachment was placed in the sheriff's hands, and the sheriff having failed to arrest him, the Plaintiff now moved that the sheriff of *Kent* might be committed to prison for contempt of Court in neglecting to arrest the Defendant as directed by the Court.

(1) 14 East, 1.

(2) 11 Q. B. D. 545.

Romer, Q.C., and *Jemmett*, in support of the motion:—

The only question on this motion is whether the sheriff, in order to execute this writ of attachment, is entitled to break open the outer door of the Defendant's house. We admit that to execute a mere civil process the sheriff is not entitled to break open the outer door, but we say that an attachment for contempt of Court is not a civil process, although the action may be in respect of mere private rights. Whenever the Sovereign's authority has been set at defiance, the sheriff may break open the outer door.

Semayne's Case (1) decides that the sheriff may not break any man's house to take execution, unless in the Queen's case, or for a contempt. In *Briggs' Case* (2) it was held that in process of contempt the outer door might be broken open.

Where an injury to the public has been committed in the shape of an insult to any of the Courts of Justice on which process of contempt is issued, the officer charged with the execution of such process may break open the house, if necessary, in order to execute it: *Burdett* v. *Abbot* (3).

In re Freston (4) is an authority in our favour, although there the question was as to the privilege of a solicitor from arrest. But Lord Justice *Lindley* put expressly the case of disobedience to an order to deliver up documents, and states that to be a wilful contempt, and consequently that there would be no privilege from arrest in such a case.

[They also referred to *Anonymous* (5); *Stockdale* v. *Hansard* (6); *Morgan* v. *Copeland* (7); *Moone* v. *Rose* (8); *Daniell's* Chancery Practice (9); *Chitty's* Archbold (10); *Smith's* Leading Cases (11); *Churchill's* Law of Sheriff (12).]

Cock, for the sheriff:—

There is no power in the sheriff's officer in executing a writ of attachment in a civil action to break open the outer door. This

(1) Cro. Eliz. 908.
(2) 1 Roll. Rep. 336.
(3) 14 East, 1, 157.
(4) 11 Q. B. D. 545.
(5) 11 Ves. 170.
(6) 11 Ad. & E. 253.
(7) 1 Jones's Ex. Rep. 248, n.
(8) Law Rep. 4 Q. B. 486.
(9) 6th Ed. p. 887.
(10) 13th Ed. vol. i. pp. 529, 606.
(11) 6th Ed. vol. i. p. 115.
(12) 2nd Ed. pp. 212, 213, 421, 475.

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is a civil action, and it is perfectly clear that an execution at the suit of an individual cannot be carried into effect by breaking open the outer door: *Cook's Case* (1); *Daniell's* Chancery Practice (2); *Chitty's* Archbold (3); *Burdett* v. *Abbot* (4).

Where the action is one in which the Sovereign is interested, or where the matter is of a criminal or disciplinary nature, then the sheriff may break in, but where the action is between individuals, even although the writ of attachment is for contempt, he has no such power.

No doubt the remarks of Lord Justice *Lindley* and Lord Justice *Fry* in the case of *In re Freston* (5) are against my contention; but that was a different case to the present. There is no direct authority upon this point, and, so far as I am aware, it is now raised for the first time.

Romer, in reply.

April 8. CHITTY, J.:—

This is a motion to commit the sheriff of *Kent* for breach of duty in not arresting the Defendant *Harvey* on a writ of attachment.

In the course of the argument an objection was taken for the sheriff that the motion was wrong in form, because a proper notice to return the writ had not been previously given to the sheriff pursuant to the 11th rule of Qrder LII. But towards the close of the argument this point was abandoned by the sheriff's counsel, who stated he was desirous of obtaining a decision of the Court upon the merits.

The question of substance is whether the sheriff may lawfully break open the outer door of the Defendant's house after due notice in order to effect his arrest.

The facts are not in dispute. By an order of the Court, dated the 13th of July, 1883, the Defendant was ordered within seven days after the service of the order to deliver over to the Plaintiff, or his solicitors, certain deeds and documents of title in

(1) Cro. Car. 537.
(2) 6th Ed. p. 887.
(3) 13th Ed. vol. i. p. 529.
(4) 14 East, 1, 155.
(5) 11 Q. B. D. 545.

pursuance of the judgment in the action as directed by an award made by virtue of a compromise. The Defendant, who was duly served with the order, did not comply with it, and thereupon a motion was made for leave to issue an attachment against him for his contempt.

On this motion, notice of which was also duly served on the Defendant, the Vacation Judge, on the 15th of August, 1883, made an order on which an attachment subsequently issued. That order recites the order of the 13th of July, 1883, and orders that the Plaintiff be at liberty to issue a writ of attachment against the Defendant "for his contempt in not having complied with the order of the 13th of July, 1883."

The writ of attachment was issued on the 27th of August, and is in the form adapted to the case, commanding the sheriff to attach the Defendant so as to have him before the Court to answer touching his contempt. The writ was indorsed with a short statement shewing the nature of the contempt.

The Defendant, who is a clergyman, resides at what is apparently his own house in *Dover*. The place of his residence is known to the sheriff, whose officers have watched the house with a view to the Defendant's arrest. The Defendant is aware that the officers are endeavouring to arrest him, and in order to prevent his arrest he has barred his house and refuses to allow any one to enter it. He has written a letter to one of the public newspapers (the original of which has been produced) from the statements in which he seems to pretend to mistake the officers for thieves or tramps, and with the object of deterring the officers from entering the house he intimates that he is armed with a revolver.

Under these circumstances the sheriff has failed to arrest the Defendant alleging that he is not entitled to break into the house for the purpose of his arrest.

The argument for the sheriff is founded on the maxim that a man's house is his castle, and that the Defendant has the privilege or right of keeping it barred so as to prevent the sheriff from breaking in for the purpose of executing this writ; and it was argued that this privilege extends to all cases where the process is civil process at the suit of a subject including an attachment for contempt.

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The Defendant has been adjudged by the Court to be guilty of a wilful contempt for disobedience to an order of the Court. The order was not an order to pay a debt or sum of money but for delivery of deeds.

Under the 5th and 20th rules of Order XLII. of the Rules of 1875, an order requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment. The 7th and 24th rules of Order XLII. of the existing rules are to the same effect. The order for attachment in the case before me clearly falls within these rules.

The question must be decided according to the authorities. The leading authority on the subject is that of *Burdett* v. *Abbot* (1) decided in the year 1811, in which the prior decisions were reviewed. In that case the Serjeant-at-Arms of the House of Commons had broken open the house of Sir *Francis Burdett* in execution of a warrant issued by the Speaker for his arrest and committal to the *Tower*. The warrant was issued pursuant to an order of the House based upon a resolution that Sir *Francis Burdett* had been guilty of breach of privilege by the publication of a libel. The Court of King's Bench decided that the Serjeant-at-Arms was justified in breaking into the house, founding its judgment on the right of the sheriff to break into a house in the execution of a writ to arrest for contempt issued under the authority of a Court of Law. Lord *Ellenborough*, in giving judgment, said (2): "Nothing is more certain than that in the ordinary cases of the execution of civil process between subject and subject, no person is warranted in breaking open the outer door in order to execute such process; the law values the private repose and security of every man in his own house, which it considers as his castle, beyond the civil satisfaction of a creditor. But I have already observed that the distinction taken in argument stands upon an extra-judicial opinion in the Year-book of the 13 Edw. 4, 9. It is there stated to have been held 'that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the common weal to take them.' And likewise *Choke* said, 'Where the King has an

(1) 14 East, 1. (2) 14 East, 154.

interest, that the writ is a *non omittas propter aliquam libertatem, &c.*' So the liberty of the party's house shall not hold where, &c., but otherwise it is for debt or trespass; the sheriff or other cannot break open his house to take him; for this is only the particular interest of the party. And this is cited in *Fitz.* Abr. Barre, pl. 110. Therefore, even in that case, the interest in the King in the execution of process seems only to be put in contradistinction to the interest of an individual in process sued out for his own particular benefit, inasmuch as the process of the Crown respects the public justice and public interest of the realm; but it is not put in contradistinction to process for contempt, in which the public at large have as much interest as in other criminal process." Then a little lower down he said:— "If it rested upon that alone, I should not have thought it an authority, especially when I find an older case in H. 18 Edw. 2, which is in *Fitz.* Execution, pl. 152, where it is said 'note, that the minister of the King coming to levy execution of damages recovered may break open the house fastened if he cannot have the key; for it is not lawful for any to disturb the execution of the King's minister,' &c. It is not however clear that this might not relate to a levy by the King's minister, as he is called, for the King's debt, and not to a levy by the King's officer for the debt of an individual subject. But in the latter sense the point was certainly ruled otherwise (and according to the *dictum* in the Year-book 13 Edw. 4, 9), in the Year-book 18 Edw. 4, 4, pl. 19, referred to in *Bro.* Abr. Execution, pl. 100; for there all the justices agreed that trespass lay against the sheriff for breaking the house to execute *fieri facias*, for by the *fieri facias* he may take the goods, but may not break the house. What is said by the Judges in that case is confirmed by a still more important authority, a decision in a case of life and death. This was *Cook's Case* (1), who was indicted for murder in voluntarily killing a sheriff's officer while attempting to break into the house for the purpose of executing civil process against him; and this was held to be manslaughter, and not murder. Upon the authority, therefore, of that case I should say that it stands perfectly clear, that an execution at the suit of an individual cannot be carried

(1) Cro. Car. 537.

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into effect by breaking open the outer door; and therefore it remains to be considered whether in this case the house was broken in the execution of process for the particular interest of an individual, or whether it was done for the public weal. That it falls under the latter description cannot, I think, be doubted. And without going into the other books cited by the Attorney-General to shew that the privilege of keeping the outer door shut against process is confined to process in civil suits, it is sufficient to refer to *Semayne's Case*, as reported in *Cro. Eliz.* 908, where it is said 'that afterwards in Michaelmas Term, 2 Jac. 1, this cause was argued again; and that *Williams* agreed with the opinion of *Yelverton* and *Fenner in omnibus*, and that the sheriff might not break any man's house to take execution unless in the Queen's case, or for a contempt,' &c. We understand by this a contempt of any of His Majesty's Courts of Justice; but it cannot be contended that the Houses of Legislature are less strongly armed in point of protection and remedy against contempts towards them, than the Courts of Justice are. There is also *Briggs' Case*, cited by the Attorney-General, which came on before Lord Chief Justice *Coke*, and is to be found in *Roll.* Rep. 336. It appears from the search which has been made in that case, that the sheriff was ruled for not returning an attachment against *Briggs;* and there it was held clearly that on process of contempt the outer door might be broken open. Therefore upon authorities the most unquestionable this point also has been settled, that where an injury to the public has been committed in the shape of an insult to any of the Courts of Justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors if necessary in order to execute it," and then he goes on to say that it had been made out among other things "that the mode of executing that warrant in this case, by breaking the house, after due notification and demand of admittance without effect, is justifiable upon the ground of its being an execution of a process for contempt, to which the personal privilege of the individual in respect to his door must give way for the public good." Then Mr. Justice *Bayley* in his judgment says (1) "Then as to the breaking of the outer door to execute

(1) 14 East, 162.

the warrant, I think that whoever reads *Semayne's Case* (1) will see that Lord *Coke* was making the distinction between those cases in which the King, standing forward as prosecutor on behalf of the subject on public grounds, was party, and other cases in which the subjects were parties only in respect of their private rights; but he was not meddling with cases of contempt. Process of contempt, however, has been held in other cases to warrant the breaking of the outer door for the purpose of executing it: it was so in *Semayne's Case*, and in *Briggs' Case* (2), and there is another case, Willes, 459, in which an attachment for a contempt was treated not as a civil, but as a criminal process; and therefore it was held it might be executed on a Sunday; and the reason assigned is, that a contempt of the Court is a breach of the peace. Now in every breach of the peace the public are considered as interested, and the execution of process against the offender is the assertion of a public right; and in all such cases, I apprehend that the officer has a right to break open the outer door, provided there is a request of admission first made for the purpose, and a denial of the parties who are within." This case is a direct authority for the proposition that the sheriff can break open outer doors when he is directed to arrest for a contempt of Court. Contempt is treated as in the nature of a criminal proceeding, and the attachment is regarded as a punishment for an offence. No distinction is drawn or attempted to be drawn with regard to the nature of the contempt.

Such a distinction was, however, drawn in the case of *In re Freston* (3), recently before the Court of Appeal. There the question raised was one not with reference to the privilege of a man's house, but with reference to the analogous privilege of his person from arrest in the case of a solicitor on his way to or from a Court of Justice. The solicitor, in his character of a solicitor, had been ordered to deliver up certain documents, to pay a sum of money and costs. He subsequently delivered the documents but did not pay the money or the costs, and the attachment was issued against him for non-payment. Before the attachment was issued he paid the money but not the costs, and he was subsequently arrested on the attachment on his way from a police

(1) Cro. Eliz. 908. (2) 1 Roll. Rep. 336. (3) 11 Q. B. D. 545.

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court. It was held that the police court was a Court of Justice, and the question was whether the privilege extended to arrests on attachments for contempt of Court. The Queen's Bench Division had apparently held that all attachments for contempt of Court are now the same and have the same incidents. The present Master of the Rolls declined to assent to that proposition. In the course of his judgment (1) he cited with approval the following passage from Lord *Redesdale's* judgment in *McWilliams' Case* (2), "There can be no doubt that the thing to be considered is, not the form of the process but the cause of issuing it; if the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as for instance, disobedience of some order of the Court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature;" and the Master of the Rolls added, "This passage seems to me to shew the distinction between the two kinds of attachment." Lord Justice *Lindley*, in his judgment (3), after referring to the passage above quoted from Lord *Redesdale's* judgment and to the fact that he had pointed out that all contempts are not the same, said, "They are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest." He there puts expressly the case of disobedience to an order to deliver up documents, and states that an attachment for such a contempt was something more than merely civil process, and that therefore there was no privilege. Lord Justice *Fry*, in his judgment (4), drew a similar distinction; he says, "It is plain that where attachment is mere process, privilege exists; where it is punitive or disciplinary, the privilege does not exist;" and then he says, "Further, if the attachment were mere process, *Freston* could obtain his discharge *ex debito justitiæ* on shewing that he had performed what was required by the Master's order; I do not think that he could have done so in the present case: the Court would have had a jurisdiction to exercise its discretion, and to punish him further."

(1) 11 Q. B. D. 553.
(2) 1 Sch. & Lef. 169, 174.
(3) 11 Q. B. D. 556.
(4) Ibid. 557.

The case before me falls within the precise words of Lord Justice *Lindley's* judgment and within the principles enunciated by the other members of the Court of Appeal.

In treating of the various kinds of contempt which were dealt with as contempt by the Court of Chancery it must be borne in mind that great alterations have taken place in the law and practice in these matters in recent times. Formerly that Court acted *in personam*, and process of contempt was the ordinary method of compelling a defendant to appear and of enforcing the decrees and orders of the Court, including decrees and orders for payment of money. The process of contempt to compel an appearance (which was bailable) has been abolished. By the statute 1 & 2 Vict. c. 110, s. 18, decrees and orders of the Court of Chancery for payment of money to a person had the effect of judgments at Common Law, and were accordingly enforceable by the ordinary writs of execution, such as a *fieri facias* and an *elegit*. By the *Debtors Act*, 1869, arrest and imprisonment for making default in payment of a sum of money were abolished except in certain specified cases. The exceptions in the 4th section, according to the case of *Marris* v. *Ingram* (1), appear generally to be cases of misconduct. The power reserved by the 5th section to commit for a limited period for non-payment of certain judgment debts is made exerciseable by order, and such order is to be executed in the same manner as a writ of *capias ad satisfaciendum*. The result is to restrict the suitor's right to an attachment for non-payment of money to the cases excepted by the 4th section, as is evident from rule 4 of Order XLII. of the rules now in force.

The distinction as to contempt for non-payment of money was recognised as long ago as the year 1797, when the case of *Ex parte Parker* (2), referred to in *Cooke's* Bankruptcy Law (3) and cited in *McWilliams' Case* (4), was decided. In that case it was held that an attachment for non-payment of money was to be considered only as process to enforce payment of a debt and analogous to an execution.

The rules under the *Judicature Acts* introduced an important

(1) 13 Ch. D. 338.
(2) 3 Ves. 554.
(3) Ed. of 1799, p. 115.
(4) 1 Sch. & Lef. 169.

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alteration in regard to attachments. Formerly an attachment issued as ordinary civil process as of course on the application of a party, as appears from the case of *Abud* v. *Riches* (1); but now, under Order XLIV., rule 2, an attachment issues only after an order of the Court made on notice to the person sought to be attached. By the 1st rule of the same order a writ of attachment has the same effect as a writ of attachment out of the Chancery Division has heretofore had; but the orders are silent as to the manner of executing the writ, whereas Order XLIII., rule 1, says that writs of *fieri facias* and *elegit* shall be executed in the same manner as heretofore. By Order XLII., rules 7 and 24, already cited, attachment and committal are apparently placed on the same footing, and in a case of *Sprunt* v. *Pugh* (2) on a motion against a receiver, in which I myself was counsel, the late Master of the Rolls (Sir *G. Jessel*) stated his opinion, though it does not appear in the report, that the distinction between committal for contempt and attachment for contempt was practically abolished; the difference between them seems mainly to be in the more summary process of the former and in the degree of inconvenience and expense attending it.

The distinction between an order for committal and an attachment for contempt was formerly considered to be, that committal was the proper remedy for doing an act prohibited by injunction or the like, whereas attachment was the remedy for neglecting to do some act ordered to be done. Committal for contempt never took place except by order of the Court.

Interference with a ward of Court, interfering with the due administration of justice, as by intimidating witnesses, or ill-treating a process server, and breaches of an injunction, were and still are all alike treated as in the nature of offences punishable by committal.

After the decisions in *Burdett* v. *Abbot* (3) and *In re Freston* (4) it is scarcely necessary to deal with the statements in the text-books. In *Daniell's* Practice (5) it is stated that the sheriff cannot break open doors in the execution of a writ of attachment.

(1) 2 Ch. D. 528.
(2) 7 Ch. D. 567.
(3) 14 East, 1.
(4) 11 Q. B. D. 545.
(5) 6th Ed. p. 887.

But the author is there dealing only with the mesne process to enforce appearance. The only authority he cites is *Chitty's Archbold*, but the passage referred to relates merely to the execution of an ordinary writ of execution, and when the author deals with disobedience to decrees he does not repeat the passage.

I may add that on a writ of sequestration which issued formerly by order, but under Order XLII., rule 4, is now, as appears from the case of *Sprunt* v. *Pugh* (1), issuable without order, the sequestrators can break open outer doors, as appears from the case of *Lowten* v. *Mayor of Colchester* (2).

So the sheriff may break open outer doors on writs of *capias utlagatum* and *habere facias possessionem*, both of which contain a *non omittas* clause.

The result appears to be that in a merely civil process at the suit of a subject (such as the execution of a writ of *fieri facias*) the sheriff cannot break open outer doors, but he can do so on a writ of attachment for a contempt of Court of such a nature as has been committed in this case.

Solicitors: *Hasties*, agent for *Hasties, East Grinstead; Palmer & Bull.*

(1) 7 Ch. D. 567. (2) 2 Mer. 395.

G. M.

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1884

April 28, 29.

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[1883 B. 1099.]

Domicil—Will—Probate—Construction of Will expressed in Terms of Foreign Law—Revocation of Probate—Jurisdiction of Chancery Division—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 34, 36—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 11.

The fact that probate of a will has been granted by an English Court is not conclusive that the testator was domiciled in *England*.

If a domiciled Englishman makes a will expressed in the technical terms of the law of a foreign country, so as to manifest an intention that it should operate according to that law, the meaning of the will must be ascertained by the foreign law, and then an equivalent effect must be given to the will in *England*.

Studd v. *Cook* (1) discussed.

Though the Chancery Division may have jurisdiction to recall the probate of a will, it ought not as a general rule to exercise that jurisdiction, even if the estate of the testator is in Court in a proceeding in that Division.

Pinney v. *Hunt* (2) followed.

By this action questions were raised as to the domicil of *Hugh Falconar*, who died in January, 1827, the construction of his will, and the validity of the probate thereof.

The testator was born in *Scotland* about the year 1771. He was educated in that country, and remained in it until about the year 1790. He inherited a small property, called *Newton*, in the county of *Nairn*. About the year 1790 he obtained a commission in the British Army, and went with his regiment to *India*, where he remained for some years. He ultimately became a major in the Army. In the year 1803 he was returning home, and while on his voyage he was taken prisoner by the French (there being then a war between *Great Britain* and *France*), and was carried as a prisoner of war to *France*, where he was detained until the year 1810. During this period he had two illegitimate daughters by a French woman, named *Marie Ann Maubon*. The daughters were named respectively *Marie* and *Jeanne*. The daughter *Marie* died in February, 1825, an infant and unmarried. In 1810 the testator was liberated and returned to *Scotland*. From 1810 till 1814

(1) 8 App. Cas. 577. (2) 6 Ch. D. 98.

he had no fixed place of residence either in *Scotland* or *England*. In 1814 he purchased a lease for thirty-five years of a house and some land at *Hartfield*, in the county of *Sussex*, and in the same year he married *Elizabeth Bradford*, an English lady. He had no children by her. He resided at *Hartfield* with his wife until the year 1819, when he sold the lease. He then became tenant of the *Rectory House* (with some land) of the parish of *Storrington*, in the county of *Sussex*, and he resided there with his wife until the year 1824. During that period, viz., on the 16th of March, 1823, his daughter *Jeanne* was by his desire re-baptized in the parish church of *Storrington* by the English Christian name of *Jane*. The testator had on the 24th of April, 1822, formally adopted her by an act of acknowledgment according to the French law. In 1824 the testator left *Storrington* and went with his wife to *Boulogne*, in *France*, leaving behind at *Storrington* a small quantity of household furniture which he had used while living there. In November, 1824, while he was residing in *France*, he sold his *Newton* estate for £2800, and he invested this sum, together with another sum of £200 (making £3000), on a heritable bond in *Scotland*. After this he never possessed any real estate in *Scotland* except this bond. In June, 1826, he returned to *England*. In October, 1826, he went to *Brighton*, where he took an unfurnished house for a term of nine months. He furnished the house, partly with the furniture which he had left at *Storrington*, partly with some furniture which he brought from *France*, and partly with some new furniture which he bought for the purpose. On the 23rd of January, 1827, he suddenly died in his house at *Brighton*. He left surviving him his wife *Elizabeth*, his adopted daughter *Jane Falconar*, two sisters, *Mary Falconar* and *Ann Falconar*, a brother, *John Falconar*, and four children of the brother, viz., two sons, *Hugh Falconar*, and *C. J. Falconar*, and two daughters, *Caroline*, the wife of *John Christie*, and *Jane*, who afterwards became the wife of *Thomas Denne*.

On the 16th of March, 1819, the testator executed a testamentary disposition in the Scotch form, *i.e.*, a trust disposition, and deed of settlement, by which he appointed trustees and executors and conveyed to them his estate at *Newton*, and all lands and other heritable subjects besides those particularly before

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disponed, all debts and sums of money heritable and moveable, and goods, gear, and effects belonging, or that might belong, to him at his decease, upon certain trusts therein declared. The deed reserved full power to the testator to alter or cancel it, or make codicils thereto. On the 26th of March, 1823, the testator made and annexed to the deed a holograph codicil, and on the 25th of January, 1826, the testator made another codicil, not holograph, written on a separate piece of paper, but not attested according to the forms required by the law of *Scotland*. In this document the sale of the *Newton* property and the investment of £3000 on a heritable bond were recited, and a disposition was made of the £3000. On the 14th of December, 1826, the testator sent to Mr. *Alexander Dallas*, a writer to the signet in *Scotland*, who was his legal adviser in *Edinburgh*, a memorandum of instructions for a new disposition of his property. The testator at the same time wrote a letter to Mr. *Dallas*, in which he said, "Gladly would I be of your society in *Scotland*, for there, I assure you, my heart is, but I must be in the reach of medical, or rather chirurgical, assistance, and, strange to say, you have not a cupper in all *Edinburgh*, and I require that operation performed on the back of my neck frequently." Mr. *Dallas*, in pursuance of these instructions prepared a draft of a testamentary instrument in the Scotch form, and on the 2nd of January, 1827, sent it to the testator at *Brighton*, and he, on the 13th of January, 1827, returned it to Mr. *Dallas*, with some holograph marginal notes suggesting some alterations in the draft. Mr. *Dallas* altered the draft in accordance with these suggestions, and returned it so altered to the testator for his execution on the 24th of January, 1827, in ignorance of the fact that he was then already dead.

By the deed or testamentary instrument in the Scotch form thus prepared by Mr. *Dallas* the testator purported to "dispone, assign, convey, and make over to and in favour of" the persons therein named as trustees the whole of his property, upon the trusts therein declared. The final clause in the instrument was as follows: "Lastly, I appoint the whole residue and remainder of my funds and estate to belong and be paid to or secured under the restriction after inserted for the behoof of the said *Jeanne* or *Jane Falconar*, now my only surviving

daughter by the said *Marie Ann Maubon*, whom I have formally adopted according to the laws of *France*, . . . and whom I hereby name, constitute, and appoint my residuary legatee. And I appoint my said trustees to be the guardians of my said daughter in the care and disposal of the funds devolving on her under this my settlement, with power to them, whether or not my said daughter shall have attained majority or be married at my decease, and I hereby specially enjoin them, to secure the residue of my funds and estate falling to my said daughter so as that the same shall not fall under the right or administration of her husband, or be attachable by his creditors or affectable by his debts or deeds, but be enjoyed by herself during her life, with the fee or remainder to her children, according as she shall divide the same among them. And, failing of her and her issue, the life-rent of the residue to belong to and be enjoyed by her husband, if she shall have left a husband surviving her, and failing my said daughter and her issue, and on the decease of her husband either before or after my daughter, I appoint my said brother *John* for his life-rent use, and his lawful children or their issue in fee or remainder, my residuary legatees."

On the 29th of March, 1828, probate of this document, as the will of the testator, was granted by the Prerogative Court of *Canterbury* in a special form to three of the persons named in it as trustees, notwithstanding the fact that the document was not dated and had not been signed by the testator. This probate was granted after proof of the document in solemn form as the last will of the testator in proceedings instituted on the 1st of December, 1827, by *John Christie*, one of the persons named in the document as trustees, against *Dallas*, who was also named as a trustee, he being also a trustee of the Scotch will of 1819. In these proceedings evidence was adduced as to the facts relating to the domicil of the testator. In the probate the testator was described as late of *Brighton*, but it did not appear that the Court had pronounced any formal decision on the question of domicil, except so far as it was involved in the grant of probate. Proceedings were also taken in the Scotch Courts to establish the trust disposition of the 16th of March, 1819, and on the 13th of December, 1828, the Lord Ordinary found that, so far as regarded

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the sum of £3000 heritably secured in *Scotland*, the trust disposition of the 16th of March, 1819, was not recalled, and that it regulated the disposal of that sum and interest, and the right of parties thereto. In 1833 the parties interested in the estate of the testator were advised by Sir *Edward Sugden* and Mr. *E. J. Lloyd*, on a case submitted to them, that the testator was at the time of his death domiciled in *England*, and that, on this supposition, in construing his will the principles and rules of English and not of Scotch law must be applied, and that by the residuary bequest so construed Miss *Jane Falconar* was entitled to only a life interest in the residue, with a power of appointment among all her children, and that in default of appointment the children would take equally, and upon the birth of a child all the ulterior dispositions would be effectually destroyed. Other legal opinions were given to the same effect. Miss *Jane Falconar* never married, and she died on the 10th of February, 1882. The income of the residue had been paid to her by the trustees during her life. She by her will, dated the 1st of February, 1881, appointed *Wilmot Henry Bradford* her sole executor. He had been on the 8th of November, 1860, appointed a trustee of the will of the testator. In the deed by which he was appointed, and to which he was a party, the document which was admitted to probate in *England* was recited as the last will of the testator, and there was also a recital to the effect that, under that will, Miss *Falconar* was entitled to the income of the residue of the testator's estate for her life. During the life of Miss *Jane Falconar* she and the other persons interested in the estate of the testator had supposed that she was only tenant of life of the residue. On the 7th of July, 1834, she executed to the then trustees of her father's will, as a security for an advance which they had made to her out of the trust fund, a mortgage of a policy of insurance on her life, and of what was described in that deed as her interest for her life in the income of the trust fund under her father's will. After her death the trustees of the testator's will in August, 1882, paid and transferred into Court in the Chancery Division, under the *Trustee Relief Act*, the funds and securities then representing the residue of the estate of the testator, and in January, 1883, a petition was presented to the Chancery Division by the personal

representatives of the testator's brother *John Falconar* (who died on the 29th of September, 1843) and by the representatives of a grandson of *John Falconar*, praying a declaration who were entitled, and in what shares, to the funds in Court.

On the 24th of February, 1883, the writ in the action of *Bradford* v. *Young* was issued by *W. H. Bradford*, as Plaintiff, against *W. B. Young*, the other trustee of the testator's will, the Petitioners, and other persons who claimed through *John Falconar*.

By the indorsement on the writ the Plaintiff claimed—(1.) A declaration that the testator was at the date of his death a domiciled Scotchman, and that his estate and effects ought to be administered according to the law of *Scotland*.

(2.) A declaration that the will or trust disposition (in the Scotch form) which was admitted to probate on the 29th day of March, 1828, was null and void, and ineffectual to pass the estate and effects of the testator.

(3.) That the probate might be revoked and recalled.

(4.) A declaration that the Plaintiff and the Defendant *W. B. Young* were trustees of the residuary estate of the testator for the beneficiaries who were entitled thereto according to the law of *Scotland*.

(5.) In the alternative, a declaration that the probate of the trust disposition ought to be read and construed according to the law of *Scotland*, and that the same might be so construed and read accordingly.

(6.) Further or other relief.

The action and the petition now came on for hearing together. By the leave of the Court the affidavits filed on the petition were admitted as evidence in the action. To those affidavits the proceedings in the Prerogative Court of *Canterbury* were made exhibits.

Cozens-Hardy, Q.C., and *A. Young*, for the Plaintiff:—

The question of domicil was not raised or decided in the proceedings in the Ecclesiastical Court; there was no opposition to the grant of probate. The probate is not conclusive as to the domicil of the testator; it shews only that the document is a

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valid testamentary instrument according to English law: *Thornton* v. *Curling* (1); *Price* v. *Dewhurst* (2); *Campbell* v. *Beaufoy* (3).

It is clear that the testator's domicil of origin was Scotch, and that that domicil was never changed.

[PEARSON, J., referred to the judgment of Lord *Chelmsford* in *Udny* v. *Udny* (4), and to *Doucet* v. *Geoghegan* (5).]

If the testator's domicil was Scotch the English probate ought to be recalled, and the estate administered according to Scotch law. The Chancery Division has, under the *Judicature Act*, power to grant probate of a will: *Pinney* v. *Hunt* (6); though, in that case, *Jessel*, M.R., in the exercise of his discretion, declined to do so. The Court must equally have power to recall a probate.

If the Court declines to recall the probate, the will must be construed according to the law of *Scotland*. When a will is expressed in the technical terms of a country in which the testator is not domiciled, it must be construed according to the law of that country: *Dicey* on Domicil (7); *Studd* v. *Cook* (8). If it is construed according to Scottish law, the effect of the rule in *Frog's Case* (9) is that the daughter took an absolute interest.

Treating it even as an English will, there is an absolute gift to the daughter, and there is nothing to take away the effect of the original gift.

An absolute interest can only be cut down to a life interest on the event happening on which it is to be cut down: *Peard* v. *Morton* (10); *Campbell* v. *Brownrigg* (11).

Glasse, Q.C., and *Wiglesworth*, for children of the testator's brother *John*:—

[PEARSON, J:—I do not wish to hear you as to the recall of the probate; if I have jurisdiction to recall it, I do not think I ought to exercise it.]

(1) 8 Sim. 310.
(2) 8 Sim. 279; 4 My. & Cr. 76.
(3) Joh. 320.
(4) Law Rep. 1 H. L., Sc. 441.
(5) 9 Ch. D. 441.
(6) 6 Ch. D. 98.
(7) Page 307.
(8) 8 App. Cas. 577.
(9) Mor. 4262; 3 R. L. C. 602.
(10) 25 Ch. D. 394.
(11) 1 Ph. 301.

The question of domicil was raised in the Ecclesiastical Court and upon exactly the same evidence as that which is now before the Court. The granting of the probate involved a decision that the testator's domicil was English, and that decision is binding on this Court.

If the testator was domiciled in *England* his will is to be construed according to English law, and on its true construction the gift to the daughter is not an absolute one. It cannot be so construed without striking out the ultimate remainder. There is a restriction on the words which would otherwise give her an absolute interest: *Lassence* v. *Tierney* (1); *Gompertz* v. *Gompertz* (2); *Scawin* v. *Watson* (3); *Crawshaw* v. *Crawshaw* (4) *Peard* v. *Morton* (5), and *Campbell* v. *Brownrigg* (6), are distinguishable. At any rate the Plaintiff is estopped from denying that Miss *Falconar* was only tenant for life. He is her executor and the sole residuary legatee under her will, and in the deed by which he was appointed trustee of the will of *Hugh Falconar*, she was expressly named as tenant for life only. How can he now be heard to say the contrary after her long acquiescence in this view?

Studd v. *Cook* (7) is not an authority that, if the testator's domicil was English, his will ought to be construed according to Scotch law, because it contains some technical terms of Scotch law. The technical terms do not affect the gift which has to be construed. There is no ambiguity in it; the words must be construed in the same way whether they are construed in *England* or *Scotland*. The law of *England* must prevail if the testator was domiciled in *England*: *Anstruther* v. *Chalmer* (8). The true conclusion, from the evidence, is that the testator's domicil was English at the date of the will. He had acquired an English domicil before he went to *France* in 1824, and he did nothing afterwards to abandon it: *Udny* v. *Udny* (9). The fact that he reserved his furniture when he gave up the house at

(1) 1 Mac. & G. 551.
(2) 2 Ph. 107.
(3) 10 Beav. 200.
(4) 14 Ch. D. 817.
(5) 25 Ch. D. 394.
(6) 1 Ph. 301.
(7) 8 App. Cas. 577.
(8) 2 Sim. 1.
(9) Law Rep. 1 H. L., Sc. 441.

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Storrington and went to *France* shews that he intended to return to *England*. The sale of his real estate in *Scotland* tends also to shew that he had abandoned his domicil of origin.

Cookson, Q.C., and *J. M. Rendel*, for the legal personal representative of one of the children of the testator's brother *John*, who survived him and afterwards died:—

Studd v. *Cook* (1) does not shew that the will should be construed according to Scotch law if the testator's domicil was English. There the testator, who was domiciled in *England*, had by his will dealt with English and Scotch real estates *uno flatu*, and the question was whether, under the same words, the English and Scotch estates were to go in a different way. The question was one of intention. It does not apply to the present case in which there is no separate *locus rei sitæ*.

As to the construction of the gift according to English law, the case is entirely different from *Lassence* v. *Tierney* (2), and that class of cases. There is, in the event of the daughter having no issue, an express gift over to a particular person to which the Court will give effect if it can; and, if the daughter had no children, her husband, if he survived her, was to take a life interest.

Everitt, Q.C., and *James Kaye*, for the representative of a grandchild, and for great grandchildren of *John Falconar*:—

The Ecclesiastical Court must necessarily have decided the question of domicil before admitting the will to probate: *Price* v. *Dewhurst* (3). If the testator's domicil was English, the will must be construed according to English law, unless it would be absolutely unintelligible according to that law: *Reynolds* v. *Kortright* (4); *Boyes* v. *Bedale* (5).

As to the construction of the gift, the absolute gift to the daughter was only to take effect in the event of all the other limitations failing. The testator uses the words "residuary legatees" in reference to his brother *John* and his children. The

(1) 8 App. Cas. 577.
(2) 1 Mac. & G. 551.
(3) 4 My. & Cr. 76.
(4) 18 Beav. 417.
(5) 1 H. & M. 798.

Court will not reject words when effect can be given to them: *Mayer* v. *Townsend* (1); *Reid* v. *Reid* (2); *Kellett* v. *Kellett* (3).

Bardswell, for the personal representatives of *John Falconar*.

Bunting, for great grandchildren of *John Falconar*.

Cecil Russell, for the trustees of the testator's will.

Cozens-Hardy, in reply:—

The gift to the daughter is absolute, and the other limitations were to come into operation only in an alternative event; the words "under the restriction after inserted" do not qualify the words "to be paid;" they only apply to the word "secured." The object was to prevent the property from falling into the hands of the daughter's husband, if she should marry, except that he was to have a life interest if she had no children. The rule is plainly laid down by *Kellett* v. *Kellett*. Treating the will as an English one, the event has happened on which the money was to be paid to her.

If the will is not to be treated as an English will of a domiciled Englishman, it must be treated as the will of a domiciled Scotchman.

The probate is not conclusive as to the domicil of the testator; it is only conclusive that the document admitted to probate was the will of the testator: *Whicker* v. *Hume* (4); *Doucet* v. *Geoghegan* (5); *Enohin* v. *Wylie* (6). You cannot construe one part of a will according to the law of *Scotland*, and another part according to the law of *England*. The whole will must be looked at, and if it appears that the testator intended it to be construed as a Scotch will, it must be so construed. This is the fair result of *Studd* v. *Cook* (7). The true test, as Lord *Selborne* said in that case, is what was the testator's intention. When a will is prepared by a Scotch writer to the signet and in the Scotch form, is it not clear that the testator's intention was to make a Scotch will, and that

(1) 3 Beav. 443.
(2) 25 Beav. 469.
(3) Law Rep. 3 H. L. 160.
(4) 7 H. L. C. 144, 156.
(5) 9 Ch. D. 441.
(6) 10 H. L. C. 1.
(7) 8 App. Cas. 577.

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it ought to be so construed? *Reynolds* v. *Kortright* (1), and *Anstruther* v. *Chalmer* (2), do not apply. In the latter case, Sir *John Leach* could not discover any intention that the will should be governed by Scotch law.

PEARSON, J.:—

The circumstances of this case are very abnormal. [His Lordship stated the facts and continued:—] The draft of a settlement which was prepared by Mr. *Dallas*, in January, 1827, is in the Scotch form from beginning to end. It begins as a Scotch settlement would begin, the terms, wherever it was necessary to use terms different from English terms, are Scotch terms; the conclusion is also in the Scotch form. I must assume that it was admitted to probate in the English Court as a valid English will, because it is plain to my mind that, if the English Court had been then told that the testator was a Scotchman, it would have been utterly impossible at that time for the Court to have admitted it as a Scotch will to proof in an English Court.

The first question which I have to decide is, whether the personal representative of Miss *Falconar* is entitled to the fund in Court, because, if he is, of course all questions which might be raised as between the personal representatives of the testator's brother *John* and his children, or his grandchildren, or great grandchildren, are disposed of. Therefore, the question is, does the personal representative of Miss *Falconar* take the whole of this residue, that is, if she were now living, would Miss *Falconar* be entitled to it herself?

The first application made to me on the part of the Plaintiff was that I would establish the domicil of the testator to have been Scotch, and that therefore the document in question was improperly proved as his will in the English Ecclesiastical Court, and that I would recall the probate. It was said that under the *Judicature Acts* the Chancery Division has now (with one exception, I believe) all the powers which any of the other Divisions (including the Probate Division) have and that, when any question of probate arises incidentally in the progress of any cause in this division, this Court ought not now to send that question for

(1) 18 Beav. 417. (2) 2 Sim 1.

discussion and decision to the Probate Division, to which it properly belongs, but ought to take upon itself to decide it. At the conclusion of the argument for the Plaintiff, I informed the Defendants' counsel that I did not require them to argue that point. I do not intend to decide now that under no possible state of circumstances would the Chancery Division have the power either to grant or to recall probate of a will. I do not say that under the *Judicature Acts* it is impossible that the Chancery Division should exercise that power, but, following what Sir *George Jessel*, M.R., said in *Pinney* v. *Hunt* (1), with which I entirely agree, I am certain that, if I were now to assume any such jurisdiction, I should not be acting at all in the spirit of the *Judicature Acts*, but I should simply throw things into the greatest possible confusion by blending together jurisdictions which undoubtedly the *Judicature Acts* intended to the utmost possible extent to keep separate. I should be assuming functions which properly belong to another branch of the Court, and that for no good purpose. I decline to do this, and I refuse to enter into the question whether the probate ought or ought not to be recalled; I simply refuse that part of the relief asked without expressing any opinion whether the Plaintiff is entitled to it, if he chooses to prosecute his claim in another branch of the High Court.

The next question is this. It was argued very strenuously that, inasmuch as probate had been granted of the document of 1827, that concluded the question of the domicil of the person whose will it was assumed to be. I think it does not. It would be impossible after the decision of the House of Lords in *Whicker* v. *Hume* (2) for me to come to that conclusion. In that case Lord *Cranworth* said in the plainest possible terms (3): "The first question made is one that was extremely important, namely, the point, whether probate was or was not conclusive evidence of the domicile. Now, I have no hesitation in saying, that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else." I cannot, therefore, hold that I am

(1) 6 Ch. D. 98.
(2) 7 H. L. C. 124.
(3) 7 H. L. C. 156.

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bound to assume that the testator was a domiciled Englishman merely because this document was admitted to probate in the year 1828 by the then Ecclesiastical Court. But I conceive that I am bound to treat that document as an existing valid testamentary instrument. I cannot for one moment ignore it; I have no right whatever to say that it was not properly admitted to probate, and, being so properly admitted to probate, it is a valid testamentary instrument, and as such I am bound to treat it.

The next question which arises, if I am not estopped as to the domicil of the testator (I may call him a testator as there is a testamentary instrument), is what ought I to assume to have been his domicil? Because the conclusion at which I must arrive as to the construction of his will must depend greatly on what his domicil was. If he was an Englishman, his will was made in *England* and was admitted to probate in *England*, and *primâ facie* I must construe it as the will of an Englishman. But it is said, although it may be the will of an Englishman domiciled in *England*, nevertheless it is a will made by a Scotch writer to the signet, made in the Scotch form, made in such a form that the testator, although he was a domiciled Englishman, must nevertheless be taken to have desired that his will should be construed according to the Scotch law, and that this takes it out of the ordinary rule that a native born Englishman making his will, though he may have used some foreign terms, must be assumed, nevertheless, to desire that his will should be construed according to the English law.

Assuming that state of facts, the question would be to what extent when a man domiciled in *England* uses a Scotch form—a foreign form, in making his will, ought the Court to give effect to the language so used as if it were a foreign language, and to import into the construction of the instrument the law of the foreign country, the terms of which have been used in the will? I confess that is not altogether a very easy question to decide, but I conceive that I should be bound to do this—to regard the instrument as written in a foreign language, and intended to have the meaning which, according to the technical terms found in it, it would have according to the law of that country to which those terms belong. It seems to me that to give less effect than that

to it would, in nine cases out of ten, be to make absolute nonsense of the instrument. Indeed, I think that in *Studd* v. *Cook* (1) the House of Lords certainly went quite as far as that. In *Studd* v. *Cook* there was a will made by a domiciled Englishman, dealing, not only with English real property, but also with real property in *Scotland*, but devising the real property in *Scotland* together with that in *England*, according to English forms and in English terms, terms, I need hardly say, which, though intelligible in *Scotland*, are not known to the Scotch law. The majority of the Judges in *Scotland* and the House of Lords decided that you must derive your knowledge of the intention of the testator by considering what the meaning of the technical terms was according to English law, and then give them an equivalent effect in *Scotland*. I do not think I have mistaken the effect of the decision of the House of Lords. I conceive, therefore, that, if the testator in the present case were an Englishman, and had made a will in the Scotch form, and if I came to the conclusion that he had adopted the Scotch form, and used Scotch terms purposely, I should be bound to inquire what the force and effect of those Scotch terms were according to Scotch law, and then to give them their equivalent weight in construing his will in England.

The question, however, which remains to be decided is this; if the probate is not conclusive of the domicil, then, although the instrument was admitted to probate in *England*, the testator may have been a Scotchman, and, if he was a Scotchman, and was not domiciled in *England*, *cadit quæstio* altogether, because then there could be no doubt that the instrument must be construed as the last will and testament of a Scotchman, and construed according to Scotch law. I regret very much that I have to decide the question of domicil. It would have been much easier for me to decide the construction of the will, assuming it to be an English will, because, in spite of all the arguments which I have heard, I confess that I have no doubt whatever, giving to all the authorities their due weight, that this gentleman intended to make his daughter his residuary legatee, and to add to the gift nothing but a provision which should protect her in case she should marry, and that, inasmuch as she did not marry, that provision had no

(1) 8 App. Cas. 577.

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effect whatever, but she remained his residuary legatee down to the time of her death. It is said that she did certain things, in which the Plaintiff, who is, if I may say so, an accidental party to this litigation, and who now represents her, participated, which bind her and him, and which estop him from now contending that the will gave her anything but a life interest. I confess that I listened to that argument with the greatest possible astonishment. It really amounts to nothing more than this, that in the year 1828 this lady was apparently advised (this is more or less conjecture) that the domicil of her father was English, and agreed to his will being proved as an English will, and, from 1828 downwards, nobody, so far as I can see, seems to have had any doubt whatever that his domicil was English, that his will was an English will, and that it was to be treated as giving her a life interest only. It is said that in 1860, Mr. *Bradford* was appointed trustee of the will, and that, if you look at the terms of the appointment which was executed by him and by Miss *Falconar*, she is treated in it as entitled only to a life interest under the will, and that Mr. *Bradford* became a trustee of the will upon the terms and under the supposition that she was entitled to a life interest only, and that is said to estop him. I cannot conceive for one moment how that could have the slightest operation, or how it could estop either Miss *Falconar*, if she were now alive, or Mr. *Bradford*, as representing her, from contending that all parties were under a mistake at that time as to the extent of her interest. She obtained no benefit, so far as I can see, by assuming at that moment that she was only entitled to a life interest. She injured no other person by then representing herself as being entitled to a life interest only. The question is perfectly open to be determined at the present moment whether she took a life interest only, or whether she took absolutely as residuary legatee.

But I have still to decide the question of domicil. Now that the testator was born in *Scotland*, that he had not lost his Scotch domicil of origin by going to *India*, and that, when he came back to *England* from *India*, his domicil still remained Scotch, is beyond all dispute. He was in *England* in 1814, and he then bought the lease of a house for thirty-five years. He sold that

lease five years afterwards, and he never had a permanent residence in *England* afterwards. He took for a short time the rectory house at *Storrington*, a house which from its nature could not be permanently his, which he might rent from the then rector, but from which the next rector would be entitled to turn him out. In 1824 he went to *Boulogne;* he was there for two years, and it was not until a very short period before his death that he came back from France. He then took a house for nine months only, and the only thing which is said to have preserved the English domicil which he had acquired, and which could be more easily lost than the domicil of origin which adheres to a man until he has done some act shewing an intention of getting rid of it, is that he left behind him a small portion of the furniture which he had at *Storrington*, and that when he came back to *England* he put that furniture into the unfurnished house which he took at *Brighton*. I think that what Lord *Westbury* said in *Udny* v. *Udny* (1) is as true in this case as it was in that, that, the moment the testator set foot on the deck of the vessel by which he left *England* for *France*, he lost whatever English domicil he had acquired, and he never acquired an English domicil afterwards. The result is that by losing his English domicil he re-acquired his domicil of origin, he retained that domicil until he died, and he was a domiciled Scotchman at the time of his death. That being so, the testamentary instrument, although it was proved in the English Ecclesiastical Court, must be construed according to the law of *Scotland*. I can do nothing, therefore, except, under the authority given to me by the Act 22 & 23 Vict. c. 63, refer the case to the Scotch Court to determine (assuming this will to be a good and valid testamentary instrument, which, as it has been proved, I must assume) what interest Miss *Falconar* took in the testator's residuary estate.

Solicitors: *Walker, Martineau, & Co.; Alfred Howard; Frere, Forster, & Co.; Markby, Stewart, & Co.*

(1) Law Rep. 1 H. L., Sc. 441, 460.

W. L. C.

PEARSON, J.

1884

May 6

GOW *v.* FORSTER.

[1883 G. 947.]

Tenant for Life and Remainderman—Settlement by Will of Share of Business—Apportionment of Loss.

A trader devised and bequeathed to trustees all his real and personal estate, including his share in the business in which he was a partner, on trust as to one moiety thereof to pay the annual proceeds (including the net profits of the business) to his daughter for her life, for her separate use without power of anticipation, and after her death the moiety was to be held in trust for her children or remoter issue. He directed his trustees to carry on the business after his death until the expiration of the partnership term, and authorized them to use, not only such capital as he should have in the business at the time of his death, but also such other part of the trust premises as they should think fit. The partnership deed authorized the partners to dispose of their shares by will; it did not provide how any loss in carrying on the business should be borne. The will contained no provision as to the mode in which any such loss should be borne as between the persons interested in the testator's estate. It had been the practice of the firm in prosperous years to divide the whole profit among the partners, and in years in which there was a loss to write off each partner's proportion of the loss from his share of the capital. The testator died in 1879. After his death the business was carried on by his trustees in partnership with the other partners. Up to the end of 1880 it was carried on at a profit, and half the testator's share of that profit was paid by the trustees to the daughter. For the year 1881 there was a loss, and the testator's share of the loss was written off from his share of the capital in the books of the firm. For the year 1882 there was a profit:—

Held, that the daughter was entitled to receive half that share of the profits which the testator, according to the practice of the firm, would have received if he had been alive, and that, consequently, she was entitled to receive half his share of the profits for the year 1882, without any deduction for the purpose of making good the *corpus* of the settled share in the interest of the remaindermen.

SPECIAL CASE.

James Foster was a partner in a business of lead manufacturers at *Newcastle-on-Tyne*. The deed of partnership provided that an annual account should be taken, and that immediately after the closing of every such account the interest on capital as therein provided for should be set apart for payment in the first place, and subject thereto the clear profits of the business should be

divided between the partners in the proportions to which they should for the time being be entitled to the partnership property. It was also provided that each of the partners might bequeath his share by will. The deed did not contain any express provision as to the mode in which any loss sustained in carrying on the business was to be borne. By his will dated the 22nd of August, 1878, *James Foster* appointed his son-in-law *C. F. Forster* and *Alexander Gow* executors of his will and trustees for the purposes thereinafter mentioned. And he devised and bequeathed to them all his real and personal estates, upon trusts for the payment of his debts, funeral and testamentary expenses and the legacies thereby bequeathed. And, subject to those trusts, upon trust out of the income of the trust premises to pay to his wife during her life an annuity. And, subject to the trusts aforesaid, the testator directed that the trust premises should be held by his trustees upon trust for his only son *Alfred James Foster*, and his only daughter *Emma Jane Forster* (the wife of *C. F. Forster*) absolutely in equal shares. But as to the share and interest of his daughter he directed that it should be held by his trustees upon trust to pay the annual proceeds (including the net profits of any business) of the same share and interest to her during her life, for her separate use without power of anticipation, and he directed that after her death the same share and interest should be held upon trust for her children or remoter issue or for her testamentary appointees or next of kin as therein mentioned. And, with respect to the business of lead manufacturers then carried on by him in partnership, the testator directed that his share and interest therein at his death should be deemed to have been bequeathed to his said trustees by the general devise and bequest thereinbefore contained, and in case the then present term of the then existing partnership, which would expire on the 1st of January, 1883, should not have expired at his death, he directed his trustees to carry on the said business until the expiration of the same term, and he expressly authorized his trustees, not only to use such capital as he should have in the said business at the time of his death, but also such other part of the trust premises as they should think fit, it being his intention that his trustees should have as full control over the whole of

PEARSON, J. 1884 GOW v. FORSTER.

the trust premises for the purpose of carrying on the said business as he would have had if he had been living. The will did not contain any express provision as to how any loss which might be sustained in carrying on the business was to be borne as between the persons interested in the testator's estate. The testator died on the 30th of March, 1879. At the time of his death his partners in the business were *John Wilson*, *Alexander Gow*, and *C. F. Forster*.

The practice of the firm was, in each year in which the carrying on of the business resulted in a profit, to divide that profit among the partners in proportion to their shares of the capital. In any year in which there was a loss, the apportioned share of each partner of the loss was written off from his share of the capital.

After the death of the testator and up to the end of the year 1882, *Gow* and *C. F. Forster* as trustees of the will continued to carry on the business in partnership with *Wilson* and themselves in their individual capacities, in accordance with the provisions of the deed of partnership. From the death of the testator up to the end of 1880 the carrying on of the business resulted in a profit, and one half of the share of that profit as belonging to the estate of the testator was (after providing for the annuity to his widow) paid to his daughter. The carrying on of the business during the year 1881 resulted in a loss, half of which loss was, in accordance with the previous practice of the firm, written off from the testator's share of the capital.

The carrying on of the business during the year 1882 resulted in a large profit, and the question arose whether, as between Mrs. *Forster* and her infant children, the whole of this profit was to be paid to her, or whether any part of it was to be applied in making good the loss of the year 1881. The action was brought for the purpose of determining this, and some other questions, the Plaintiff being *Alexander Gow*, and the Defendants Mr. and Mrs. *Forster*, their two infant children, and the testator's widow. A special case was stated for the opinion of the Court, and one of the questions asked was, whether Mrs. *Forster* was entitled (subject to the claims of the widow) to receive one half of the net profits belonging to the testator's share in the business earned in the

year 1882, without deduction, or whether the same moiety was liable in the first place to recoup to the *corpus* of her settled share of his estate one half of the loss attributable to the testator's share sustained in the year 1881.

W. C. Druce, for the Plaintiffs, stated the case.

Sir *Arthur Watson*, for Mrs. *Forster* and her husband:—

Howe v. *Earl of Dartmouth* (1) does not apply. Mrs. *Forster* is entitled to half the profits in each year, whatever they may be. She is under no obligation to make good any loss which has accrued in previous years. Regard must be had to the practice of the firm, and the loss must be written off from the capital.

[Pearson, J., referred to *Brown* v. *Gellatly* (2).]

Upton v. *Brown* (3) is distinguishable. There the business was being carried on by a receiver, who was an officer of the Court.

[Pearson, J.:—I decided that case on the ground that the losses were in the nature of debts, which would naturally be carried on to the next year.]

The intention in the present case is that the tenant for life should have half the profits whenever there are profits. If there are no profits she will receive nothing.

[Pearson, J.:— *Green* v. *Britten* (4) seems to be somewhat in your favour.]

The question there was whether the property ought to be converted or not.

Leverson, for Mrs. *Forster's* children:—

The tenant for life ought to make good the loss. She has had the benefit of the profits when they were large. The testator could not have intended the remaindermen to be mulcted in this way. The principle of *Upton* v. *Brown* applies. Indeed this is an *à fortiori* case.

(1) 7 Ves. 137.
(2) Law Rep. 3 Ch. 751.
(3) *Ante*, p. 588.
(4) 1 D. J. & S. 649.

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Ex parte Harper (1) appears to be the only case at all in point.

[Pearson, J.:—The crucial point seems to me to be—would these profits have been carried to the credit of the testator in the books of the firm if he had been living?]

The books of the firm are not binding as between the tenant for life and the remaindermen. The remaindermen ought not to run a risk depending on the mode of making out the balance sheet of the firm.

Sir *Arthur Watson*, in reply:—

There is no way of adjusting the rights of the tenant for life and the remaindermen, except by doing that which would have been done if the testator had been alive. It is not suggested that the tenant for life ought to pay back what she received in the prosperous years.

Pearson, J.:—

I am far from saying that the question of the relative rights of a tenant for life and remaindermen in property of this nature is not a difficult question. It has come before me on more than one occasion, and I have always felt it a matter of considerable difficulty to decide satisfactorily to my own mind what are the rights of the parties. [His Lordship stated the provisions of the will and continued.]

According to my reading of the will there was no limit (except the amount of the testator's estate,) to the sum which the trustees might put into the business. [His Lordship then stated the other facts, and continued:—]

In accordance with the practice of the firm, the tenant for life received nothing from the unprosperous year, 1881, because there were no profits to pay her. She went without income so far as this business was concerned. The question now is, her proportion of the loss for that year having been written off against her share of the capital, whether out of her share of the profits for the year 1882 the trustees ought to retain in their hands (for

(1) 1 De G. & J. 180.

I do not understand that they could pay it into the business) a sum equal to that which was written off the capital of her share in respect of the year 1881.

If I am to hold that they ought to do this, I must come to this conclusion, that, the business being carried on in the same way in which it was during the testator's lifetime, and the trustees going to the manager of the business and inquiring what are the profits which they are to receive and pay over to this lady as her share of the annual proceeds given to her by the will of the testator, and having received those profits, they must also inquire whether any losses were written off against the capital during the preceding year, and, if they find that losses were written off, they must deduct from the profits payable to the lady in respect of her share in the present year, and retain in their hands so much as is necessary to make good her proportion of the loss which was written off in the preceding year. I cannot bring myself to the conclusion that that was the intention of the testator, and of course I must be guided by the directions which I find in his will. As I understand the will, he intended that the business should be carried on in the same way in which it was carried on during his lifetime, with such modifications only as the change of circumstances would render necessary, and which, in the discretion of the trustees acting under the powers given to them by his will, they might agree to. Subject to that, I conclude from the terms of the will that the testator's intention was that the business should proceed as it had proceeded, and that the daughter should be entitled to one moiety of those profits which he himself would have received if he had lived and had continued to be a partner in the business. If that had been so, he would have received in respect of the year 1882 the whole amount of the profit which the trustees have now in their hands, and under the circumstances I must hold that the daughter is entitled to receive a moiety of the profits which her father himself would have drawn if he had been living.

Solicitors for all parties: *Shum, Crossman, & Co.*, agents for *Stanton & Atkinson, Newcastle-on-Tyne.*

W. L. C.

PEARSON, J. 1884 May 7.

MAYOR AND CORPORATION OF BRISTOL *v.* COX.

[1883 B. 4830.]

Production of Documents—Privileged Communications—Opinions of Counsel—Reports of Sub-Committees.

Upon a summons by the Defendant that the Plaintiffs—the corporation—might be ordered to produce the documents comprised in their affidavit of documents:—

Held, that opinions of counsel with reference to these proceedings, whether taken before or after the commencement of the action, were privileged; and the fact that the Defendant was a ratepayer and the opinions might have been paid for out of the parish rates gave the Defendant no special claim to inspection; and also that minutes of the corporation and sub-committees appointed by them to report concerning matters connected with the litigation were also privileged.

THIS was a summons by the Defendant *Alfred Cox* that the Plaintiffs be ordered to produce certain documents in their possession, including the cases to counsel with their opinion thereon, the report of the salvage sub-committee, and the minutes of the streets improvement committee, such documents forming part of the documents set out in the schedule to the Plaintiffs' affidavit of documents sworn in the action.

The Plaintiffs were the sanitary authority for the urban district of *Bristol*, and for the last ten years they had under statutory powers made extensive purchases of land and hereditaments in *Bristol* for improvements in the town, and they had from time to time sold by public auction surplus portions to a large amount of the lands and hereditaments so purchased, and in consequence of the plots of land being mixed up in such a manner as to make it difficult to fix the boundaries, they had, in order to save expense in deducing a title, been in the habit, under the advice of counsel, of providing by their conditions of sale that each purchaser should admit that the Plaintiffs were seised of the property sold in fee simple in possession both at law and in equity free from incumbrances, and that the Plaintiffs had power to sell the same subject to such conditions, and that no purchaser should make any requisitions in respect of any of the statements contained in

the conditions nor require any evidence in support of the statements; and that the Plaintiffs should not be required to enter into any covenant for title or production of deeds, except only a limited covenant that they had done no act to incumber. The Plaintiffs found that selling under these conditions of sale did not interfere with the price obtained at the sales of the surplus lands, and great expense was thereby saved; but the conditions so adopted by the Plaintiffs were greatly objected to by some of the solicitors practising in the town, and a meeting was held of the Incorporated Law Society of *Bristol*, at which resolutions were passed condemning the system adopted by the Plaintiffs, and one of such resolutions was to the effect that certain members of their society should attend the sale then advertised to take place of certain surplus lands and draw public attention to the facts, and should advertise in the newspapers the resolutions then passed.

The Plaintiffs claimed an injunction to restrain the Defendant, who was the President of the Incorporated Law Society of *Bristol*, from attending at any sale by auction to be held of any surplus lands or salvages belonging to the Plaintiffs, for the purpose of drawing attention to the resolutions so passed at the said meeting of solicitors held at *Bristol*, and from drawing attention to such resolutions at any such sale, and from issuing advertisements or circulars referring to such resolutions, and from doing any other act tending to disparage the title of the Plaintiffs to any of their property.

Everitt, Q.C., and *E. Ford*, for the Defendant, in support of the summons:—

We ask by this summons, in the first place, to have production of the cases laid before counsel and the opinions given thereon. We believe that they will disclose the fact that the corporation have taken these proceedings contrary to the legal advice given them. The Plaintiffs some time before the present action brought a former action against us, and that was abandoned, and they paid the costs. It is under the circumstances of the greatest importance that we should have inspection of the opinions given. The opinions must have been taken before the present proceedings

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were commenced, and we have on that ground a right to see them, but besides that, the Defendant Mr. *Cox* is not only a member of the Incorporated Law Society but he is a resident in *Bristol* and a ratepayer, and it is with the money of the ratepayers that the opinions have been taken, which would give us a right to see the documents. Then we claim a right to inspect the reports of the committees and sub-committees of the corporation, which could not come under the rule as to privileged documents.

They cited *Minet* v. *Morgan* (1) and *Taylor* v. *Batten* (2).

Cookson, Q.C., *Philbrick*, Q.C., and *Bush*, for the corporation, contended that the whole of these documents were privileged, and cited *Herring* v. *Clobery* (3), and submitted that the cases of *Minet* v. *Morgan* and *Taylor* v. *Batten* were authorities in favour of this contention.

PEARSON, J. :—

This is an action of a very curious description and one which I certainly never saw before, but I am far from saying that such an action, or one similar to it, is not to be found in the books, for I rather think it is. It is an action by the mayor and corporation of the city of *Bristol* against Mr. *Cox*, who is the president, or who has been the president, of the Law Society in that city. The object of the action, in the first instance, is to get an injunction to restrain Mr. *Cox* from issuing what I may call a circular for the want of a better word, stating that in the sales of surplus land made by the corporation they were, if I may say so—not using the word offensively—deluding the public into the belief that they were selling land with a good title, whereas, in fact, it was land with a defective title, and that the conditions of sale under which the corporation put up the land for sale were improper conditions of sale. Now, really, I think in those few words I have described the whole offence of Mr. *Cox* complained of by the corporation. The principal point to be decided at the hearing of the action is aye or no was Mr. *Cox* justified, either in his capacity

(1) Law Rep. 8 Ch. 361. (2) 4 Q. B. D. 85.
(3) 1 Ph. 91.

as having been president of the Incorporated Law Society of *Bristol*, or as representing that body, or as a private individual, or as a ratepayer, if you please, of the city of *Bristol*, in issuing such a circular as that. When you come to look at the defence you find really that that is the point which is assumed to be in issue between the parties. There is no allegation whatever that the corporation has been guilty of fraud of any sort or description. What is said in the defence is this: "You are selling under conditions of sale, which conditions of sale convey a wrong impression to the purchaser: and you have no right whatever to sell under such conditions." Practically that is the whole question to be decided between the parties. Upon that particular question I give no opinion of any sort or description, nor do I mean to indicate any inclination of opinion one way or the other. Whenever that case comes to be determined, if it is to be heard in this Court before me, I shall come to it with my mind absolutely unprejudiced by anything that has passed to day. I shall listen with all respect to the arguments on both sides in order to endeavour to come to a right conclusion upon it. The only point before me now is this: The corporation have been required to put in by their officer the usual affidavit of documents. They have done so, and they claim privilege for certain documents. There are two questions, or rather I may say three questions, raised. The first is whether the schedule, assuming it all to be privileged, is sufficiently accurate in form; secondly, whether the documents are privileged or are not privileged; and, thirdly, whether, even assuming such privilege had been properly claimed for some of the documents, the privilege has been properly claimed by this affidavit. With regard to the first question, I have already intimated my opinion that the schedule is not satisfactory, that the cases ought to be ear-marked in the schedule. The correspondence in the same way ought to be so marked, that if this Court made an order for production the Court would then know whether it had been produced or not.

With regard to the second question, omitting the case laid before Mr. *Davidson* and the printed report, which I will deal with presently, I am of opinion that the privilege is sufficiently and properly claimed, and that these documents are privileged. All

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those documents or minutes made by the committees of the corporation to whom the matters were referred, and which contain nothing more, as far as I can gather from the affidavit, and I may add also from the statement of counsel at the Bar, than simply a record of proceedings which took place at the meetings of the committee, with reference either to litigation, which it was contemplated might take place, or to the litigation which did take place before, or the litigation which is now in existence—whether the minutes relate to either one or the other of those matters, I am of opinion that those minutes are privileged. I conceive that any notes made by a man with reference to his own conduct in the litigation—simply notes made of his own opinions—are just as much privileged as the thoughts which pass through his mind, and I conceive, inasmuch as this corporation cannot in its corporate capacity either think or write or act except by certain machinery, which is, so to speak, extraneous of itself, the corporation is perfectly justified in referring all these matters to a committee and asking the committee to deal with them as it would deal with them itself, and they are simply the agents of the corporation for the purpose of considering what ought to be done, and their reports are confidential matters; and under those circumstances those matters are to my mind protected.

It was said, however, that the affidavit was not sufficient in this respect, because it states this, "that they consist of minutes of the Plaintiffs' committees made with reference to, in contemplation of, and during litigation between the Plaintiffs and the Defendant." I was asked to read those words conjunctively because of the word "and" there, and say that they all refer to matters during litigation between the Plaintiffs and Defendant. I cannot say that, because I should make nonsense of it if I did. I must read it as if it were minutes made with reference to litigation between the Plaintiffs and Defendant; minutes made in contemplation of litigation between the Plaintiffs and Defendant and minutes made during litigation between Plaintiffs and Defendant. That, I think, is the meaning of the sentence, and I do not think I am entitled at all to force the words in order to arrive at the real meaning of that sentence. Now, with regard to the *lis mota*, I do not hesitate to say it is often very difficult to determine

when that first takes place. I find this, that in the statement of claim it is stated there was a resolution passed by the Incorporated Law Society on the 5th of July, 1880, and it is further stated: "The propriety of the aforesaid condition of sale having thus been called in question the Plaintiffs caused a case to be laid before" a very eminent counsel. I am of opinion therefore that it did not begin earlier, and that the *lis* was actually *mota* on the 5th of July, 1880, and as all these minutes are subsequent to the 5th of July, 1880, they are minutes which come within the claim of privilege stated in the affidavit. With regard to the cases, I think the cases and opinions, assuming them to have taken place since that date, are privileged in the same way. But a curious and ingenious argument was used by Mr. *Ford*. He says: Oh! but Mr. *Cox* is not only an excellent President of the Incorporated Law Society but he is also a ratepayer of the city of *Bristol*, and being a ratepayer he has contributed towards paying for all those cases and opinions, and having done that the case comes within the authorities of those cases where trustees have taken counsel's opinion at the expense of the trust estate and the *cestuis que trust* are entitled to see it. He says that the corporation are trustees for Mr. *Cox*, that they have got these cases and opinions practically at the expense of Mr. *Cox*, and Mr. *Cox* is therefore entitled to see them. I think that if this was an action by Mr. *Cox* as a ratepayer against the corporation of the city of *Bristol* with regard to some matter or other which related to the raising of the rates, or to the expenditure of the rates, it may be quite possible, and it is very probable, that Mr. *Cox* would have a right to see them, but this is an action by the mayor, alderman, and burgesses of the city of *Bristol*, not as against Mr. *Cox* in any way whatever as a ratepayer, but as a corporation really defending the interests of the ratepayers themselves against the Defendant, who they say is injuring those interests. That is a totally different case altogether, and I am of opinion that that argument cannot prevail. It was also argued before me that there may be facts in these cases and opinions, and in the minutes also, which if they were produced would shew that the corporation was doing something which they ought not to do. As I have pointed out to the

PEARSON, J. 1884 MAYOR AND CORPORATION OF BRISTOL v. COX.

counsel, whatever advice the corporation may have received during the whole of these proceedings cannot possibly weigh with the Court when the Court comes to determine this case; because the Court will have to determine for itself whether or not the action of the corporation was right or wrong, and whether or not the action of Mr. *Cox* was right or wrong. It may possibly be that both are wrong, and it may possibly be that both are right. I am not precluding that question the least in the world. But I cannot help saying that there is a passage cited in the case of *Minet* v. *Morgan* (1) from the judgment of Lord *Brougham* in *Bolton* v. *Corporation of Liverpool* (2) by the present Lord Chancellor with approbation, which, if you were to alter a few words, would apply to this case exactly. The Lord Chancellor says Lord *Brougham*, in his judgment, dealt with the argument which occurred there in this way, "The plaintiff here does not claim anything positively or affirmatively under the documents in question." Of course for "Plaintiff" you must here read "Defendant." "He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is that they rebut or negative the plaintiff's title: they are the corporation's title, and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, 'Prove me liable if you can.' The corporation have certain documents which they say, prove this liability. He cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are." So, I say, in this case Mr. *Cox* cannot by any possibility call for these opinions to shew that the corporation thought they were doing what was wrong, if it turns out in the judgment of the Court the corporation were right. It depends upon that, and it does not depend upon any opinions that were given; and no evidence that they did that which they

(1) Law Rep. 8 Ch. 361, 365. (2) 1 My. & K. 88, 92.

thought was right or did that which they thought was wrong can possibly decide the question at the hearing between the corporation and Mr. *Cox*. There remains Mr. *Davidson's* opinion, which is stated in the statement of claim. I think that ought to be produced, and I say so for this reason: because, as I understand, the whole effect of that opinion has been stated in the statement of claim. If there is no objection on the part of the corporation to produce it, I decide that it should be produced. If there is an objection on their part to produce it, I am rather inclined to think, Mr. *Everitt*, I must leave you to your rights under the orders of the Court. That is to say, if they refuse to give you inspection of it, they cannot set it up for whatever it may be worth at the trial; but I should be better pleased, I confess, it having been stated in the statement of claim, if it were produced. With regard to the printed report I am of opinion that the affidavit by some accident has omitted to claim privilege for that printed report. It cannot come within the words "and also of confidential communications between the Plaintiffs and their solicitors." It is not that. It is a confidential communication between the committee and the corporation; and under these circumstances I must desire the corporation to put in a better affidavit with regard to this printed report, expressing my opinion now that if that was a private report, so to speak, from the committee to the corporation, if privilege is properly claimed for it, it is entitled to privilege. It should be stated to be privileged as to the subject-matter in litigation. I agree that during litigation means the former litigation and this litigation, that is with reference to litigation generally between the Plaintiffs and this Defendant. I think there should be a further affidavit as to the printed report; and, when that is made, I desire the schedule to be corrected as to ear-marking the cases. The costs will be costs in the action

Solicitors for the Plaintiffs: *Warry, Robins, Burges & Co.*
Solicitors for the Defendant: *Gregory, Rowcliffes & Co.*

T. W. G.

PEARSON, J. MUTUAL LIFE ASSURANCE SOCIETY *v.* LANGLEY.

1884

May 12.

[1883 M 854.]

Mortgage—Priority—Fund partly in Court and partly in Hands of Trustees—Notice—Stop Order—Practice—Foreclosure Action—Several Defendants—Time for Redemption.

When an assignment is made of an interest in a trust fund, part of which is in Court and part in the hands of the trustees, the assignee in order to complete his title must, as regards the fund in Court, obtain a stop order, and, as regards the fund in the hands of the trustees, give notice to the trustees. Notice to the trustees will be ineffectual as regard the fund in Court, and as to that fund the priorities of different assignees will be determined by the dates at which they have obtained stop orders. An assignee who has obtained a stop order is entitled (as regards the fund in Court) to priority over a prior assignee (of whose assignment he had no notice), who had given notice to the trustees before the date of the stop order, but who had not himself obtained any stop order.

As a general but not invariable rule, when there are several defendants to a foreclosure action, one period for redemption should be allowed to all the defendants.

THIS was a foreclosure action.

De Castro Fisher Lyne was, under the will of *Stephens Lyne Stephens*, deceased, entitled to an absolute reversionary interest in one equal undivided ninety-third part or share of the residuary real and personal estate of the testator, expectant on the death of a tenant for life. The estate of the testator was being administered by the Court in a suit of *Bulkeley* v. *Stephens*.

By a deed dated the 28th of May, 1872, *De Castro Fisher Lyne* assigned his reversionary interest under the will of the testator to *Charles Langley*, by way of mortgage to secure the repayment of an advance of £800. Notice of this mortgage was given to the trustees of the testator's will on the 27th of June, 1876.

By a deed dated the 27th of February, 1878, *De Castro Fisher Lyne* charged his reversionary interest under the will of the testator (together with some other property) with the payment of £200 and interest to *H. N. Pym* and *S. J. Nicolle*, subject to some prior mortgages. *Pym* and *Nicolle* had no notice of the prior mortgage to *Langley*. Notice of this deed was given to the trustees of the testator's will, on the 27th of February, 1878.

By a deed dated the 17th of February, 1880, the benefit of the charge created by the deed of the 27th of February, 1878, and also the prior mortgages referred to in it, were transferred to the *Mutual Life Assurance Society*.

Before May, 1872, the greater part of the funds subject to the trusts of the testator's will had been transferred into Court in the suit of *Bulkeley* v. *Stephens*, but at the date of both the mortgages of the 28th of May, 1872 and the 27th of February, 1878, part of the funds remained in the hands of the trustees of the will and had not since been transferred into Court. On the 25th of January, 1883, the *Mutual Society* obtained a stop order on the funds in Court in the suit of *Bulkeley* v. *Stephens*. *Langley* never obtained a stop order.

This action was commenced on the 9th of March, 1883, by the *Mutual Society* against *Langley*, some subsequent incumbrancers, and the trustee in bankruptcy of the mortgagor, for foreclosure of the mortgaged property. Some of the subsequent mortgagees and the trustee in bankruptcy disclaimed and were dismissed. The other subsequent mortgagees did not deliver any pleadings, and notice of motion for judgment was served on them. The action came on for trial in the ordinary way as against *Langley*. The other Defendants who remained parties to the action did not appear.

The principal question was whether *Langley* was entitled to priority over the Plaintiffs' mortgage of the 27th of February, 1878, as regarded so much of the funds subject to the trusts of the testator's will as were in Court. It was admitted that in respect of their prior mortgages the Plaintiffs were entitled to priority over *Langley* as regarded the whole of the funds subject to the trusts of the will, and that *Langley* was entitled to priority over their mortgage of the 27th of February, 1878, as regarded that part of those funds which was in the hands of the trustees of the will.

Cozens-Hardy, Q.C., and *Farwell*, for the Plaintiffs :—

By virtue of our stop order we are entitled to priority as regards so much of the trust fund as is in Court in the administration suit: *Pinnock* v. *Bailey* (1).

(1) 23 Ch. D. 497.

PEARSON, J. 1884 MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

W. W. Karslake, Q.C., and *A. G. Langley*, for the Defendant *Langley*:—

If the whole of a trust fund is in Court, a mortgagee can complete his title only by obtaining a stop order, and the priority of different mortgagees is determined by the dates of their stop orders. But, if a part of the fund is in the hands of the trustees, notice of any mortgage must be given to them. So long as the trustees have any active duties to perform a mortgagee cannot complete his title without giving notice to them, and the priority of different mortgagees is determined by the dates of their notices. It has been decided that when part of a trust fund is in Court notice given by a mortgagee to the trustees is sufficient (without a stop order) to take the fund in Court out of the reputed ownership of the mortgagor in the event of his bankruptcy: *Matthews* v. *Gabb* (1); *Thompson* v. *Tomkins* (2). Vice-Chancellor *Kindersley* in the latter case (3) was evidently of opinion that a notice to the trustees gives priority as to the whole fund, even though part of it is in Court.

[PEARSON, J., referred to *Warburton* v. *Hill* (4).]

For this purpose an assignee by the act of the party stands in the same position as a trustee in bankruptcy. A stop order alters no rights. A previous notice to the trustees of the fund is effectual without any stop order.

[PEARSON, J.:—You say notice to the trustee is notice to the Court, but notice to the Court is not notice to the trustee?]

The trustee must inform the Court of any notice which he receives.

[PEARSON, J.:—Why should not the Court inform the trustee of a stop order? Suppose the owner of a fund in Court has assigned it; the assignee does nothing; then the owner becomes bankrupt; can the trustee in the bankruptcy by getting a stop order obtain priority over the prior assignee? A trustee in bankruptcy takes only such interest as the bankrupt has.]

The trustee has the benefit of the doctrine of reputed ownership. How can a stop order obtained in January, 1883, affect my notice

(1) 15 Sim. 51.
(2) 2 Dr. & Sm. 8, 20.
(3) 2 Dr. & Sm. 20.
(4) Kay, 470.

given in June, 1876? The bulk of the fund was in Court before any of the securities were given, though there may have been some accretions to it since. Notice to the trustees is sufficient so long as they have active duties to perform in relation to the whole fund.

[PEARSON, J.:—Suppose £5000 was in Court, and only £500 in the hands of the trustees?]

The principle is the same whatever the comparative amounts. A stop order gives this advantage, that no part of the fund in Court can be paid out without notice to the person who obtains the order, but it does not alter any rights: *Lucas* v. *Peacock* (1). A stop order has no effect whatever on a fund which is not in Court, and it only affects the fund which is in Court at the time when it is obtained. *Pinnock* v. *Bailey* (2) is inconsistent with *Thompson* v. *Tomkins* (3). At any rate, *Thompson* v. *Tomkins* covers the present case.

Cozens-Hardy, in reply:—

Matthews v. *Gabb* (4) and *Thompson* v. *Tomkins* merely decided that notice to the trustee of a fund which was in Court was sufficient to take the fund out of the reputed ownership of the owner. *Thompson* v. *Tomkins* was cited in *Pinnock* v. *Bailey*, the decision in which followed that in *Bridge* v. *Beadon* (5). The first stop order gives priority in regard to a fund in Court: *Swayne* v. *Swayne* (6); *Greening* v. *Beckford* (7). When a fund is in Court, the Court is really the trustee of it: *Warburton* v. *Hill* (8).

PEARSON, J.:—

This case raises a question of some novelty. [After stating the facts his Lordship continued:—] The question is whether the Defendant *Langley*, by means of his notice given to the trustees in June, 1876, nearly seven years before the stop order was obtained by the Plaintiffs, has acquired priority over the

(1) 9 Beav. 177.
(2) 23 Ch. D. 497.
(3) 2 Dr. & Sm. 8.
(4) 15 Sim. 51.
(5) Law Rep. 3 Eq. 664.
(6) 11 Beav. 463.
(7) 5 Sim. 195.
(8) Kay, 470.

PEARSON, J. 1884 MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

Plaintiffs as regards so much of the trust fund as is in Court. The Plaintiffs claim that by virtue of their stop order they are entitled to priority as regards the fund in Court; they admit that they are not entitled to priority as regards the fund which is in the hands of the trustees. The question is whether when an assignment is made by a *cestui que trust* of his interest in a trust fund, part of which is in Court, and part in the hands of the trustees, a notice of the assignment given by the assignee to the trustees is sufficient to complete his title as to the fund in Court. It has been decided in many cases, and it is not disputed, that, if the whole of the trust fund is in the hands of the trustees, notice of the assignment must be given to the trustees in order to complete the assignee's title, and it is not disputed that, if the whole of the fund is in Court, a stop order must be obtained by the assignee in order to complete his title. The question is, when part of the trust fund is in the hands of the trustees, and part is in Court, do the trustees sufficiently represent the whole fund, so that a notice to them is sufficient to bind that part of the fund which is in Court? To shew that they do, *Matthews* v. *Gabb* (1) and *Thompson* v. *Tomkins* (2) have been cited. In both those cases part of a trust fund was in Court, and part was in the hands of trustees, but the question was whether a notice to the trustees was sufficient to take that part of the fund which was in Court out of the reputed ownership of the assignor who had become bankrupt. That question, however, is very different from the question which arises between two incumbrancers, for the very slightest notice is sufficient to determine the consent of the true owner, and to take the fund out of the reputed ownership of the bankrupt. With regard to the effect of a notice to trustees it is said that, though a fund is in Court, the trustees still remain trustees of it, and that notice of an assignment given to them is sufficient for all purposes. That, however, can hardly be so, because it is not disputed that, if the whole of the fund is in Court, notice of an assignment must be given to the Court by a stop order. This shews that after payment into Court the trustees remain trustees with only what I may call suspended animation. It may be said that the rule is that if there are several trustees

(1) 15 Sim. 51.

(2) 2 Dr. & Sm. 8.

notice to one of them is enough, so long as the one to whom the notice is given is alive, because the Court assumes that he will do his duty by communicating the notice which he has received to the other trustees. But, assuming that I can consider that the trustees are trustees jointly with the Court, can that rule apply in the present case? The trustees cannot immediately communicate to the Court any notice which they receive, nor is it the practice of the Court to direct notice of a stop order to be given to the trustees. A stop order is an order of a peculiar kind, and it is well settled that it does not alter any rights. To my mind the principle on which the Court has proceeded is this, that the proper person to receive notice of an assignment is the person who has the trust fund in his hands. Can it make any difference that a part only of the fund has been transferred into Court? I think not. I am of opinion that as the fund is divided, part of it being in Court, and part in the hands of the trustees, so that the original trustees have no control over the fund in Court, that fund stands in a different position from the rest, and in a different position from that in which all the funds originally stood. Under the circumstances I must come to the conclusion that, so far as regards the fund in Court, notice of an assignment must be given to the Court, and that a notice to the trustees can have no effect. One reason why it is required that notice of an assignment of a trust fund should be given to the trustees is, that they may be able to give information to any person who makes inquiries of them, whether they are aware of any assignment of or incumbrance on the fund. It is quite plain that a stop order might be obtained without the trustees receiving any notice of it, and consequently a notice to the trustees would not, after a part of the fund had been paid into Court, answer the same purpose as it would before. You cannot go to the trustees and ask them whether the Court has received notice of any assignment, any more than you can go to the Court and ask whether the trustees have received notice of any assignment. The fact is that, when part of the fund has been paid into Court, there are two different sets of trustees, though for some purposes there is a union between them, and different notices are required. I must, therefore, hold that as regards the fund in Court, the Plaintiffs have obtained

PEARSON, J. priority over the Defendant *Langley* by means of their stop order.

1884

MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

Cozens-Hardy, Q.C., asked that one period for redemption might be fixed for all the Defendants.

W. W. Karslake, Q.C.:—In a recent case Mr. Justice *North*, notwithstanding your Lordship's decision in *Smith* v. *Olding* (1), said that one time for redemption for several defendants should be fixed only in cases in which there is so much entanglement that the plaintiff would be unduly delayed if successive periods for redemption were allowed.

PEARSON, J.:—

I will give six months for redemption to the Defendant *Langley*, and one period of three months afterwards for all the other Defendants. My opinion is in favour of fixing, as a general rule, one period of redemption; the practice of giving successive periods has been found very inconvenient. I do not think I was wrong in my decision in *Smith* v. *Olding*. But the present case is a very peculiar one, and therefore I allow the additional three months.

Solicitors for Plaintiffs: *Burchell & Co.*

Solicitors for Defendant *Langley*: *Hores & Pattisson.*

(1) 25 Ch. D. 462.

W. L. C.

Ex parte COOPER. *In re* MORRIS.

C. A. 1884 Feb 1, 20.

Proof in Bankruptcy—Preferential Debt—Wages—Employer and Workman—Payment of Wages in Coin—Deductions to pay Doctor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 32—*Truck Act* (1 & 2 *Will.* 4, *c.* 37), *ss.* 1, 2, 3, 4, 23 [*Revised Ed. Statutes, vol. vi., pp.* 946, 947, 952.]

By an arrangement between employers and their workmen certain deductions were made from the workmen's wages (which were paid monthly) for a "doctor's fund," which was established for the purpose of paying a doctor, who attended the workmen and their families and supplied them with medicines in case of illness. The sums thus deducted were handed over by the employers to the doctor from time to time. There was no contract in writing between the employers and the workmen authorizing the employers to make the deductions, nor was there any evidence that the doctor had accepted the liability of the employers. The employers filed a liquidation petition, and at this time there stood to the credit of the "doctor's fund," in their books, a sum of £149, which had arisen from deductions thus made from the workmen's wages, and had not yet been paid over to the doctor:—

Held, that there had been no valid payment (within the *Truck Act*) of the £149 to the workmen, and that they were entitled to be paid the £149 in full out of the employers' estate as unpaid wages.

Whether, if the £149 had been, in pursuance of the arrangement, actually paid over by the employers to the doctor, in discharge of a debt for which the workmen were liable, or if the doctor had accepted the liability of the employers, the *Truck Act* would, notwithstanding the absence of a contract in writing signed by the workmen, have applied,—*Quære.*

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, while the *Bankruptcy Act*, 1869, was in operation.

In December, 1882, Messrs. *Percy Harold Morris & Ebenezer Edgar Morgan*, who carried on business at *Briton Ferry*, in *Glamorganshire*, as bar-iron and tin-plate manufacturers, under the firm of *D. Morris & Co.*, filed a liquidation petition. It had been the custom when the wages of their workmen were paid, which was done monthly, for the firm to make certain deductions for a "doctor's fund" and for another fund called the "reading-room fund." The doctor's fund was for the purpose of paying a doctor, who attended the workmen and their families and supplied them with medicines in case of illness; the other

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fund was for maintaining a reading-room for the use of the workmen. The sums thus deducted were intended to be handed over by the firm in lump sums to the doctor and the treasurer of the reading-room respectively. On the back of a ticket, which was given to each workman when he received his wages, were printed some "terms and regulations," among which was the following:—"The payments to doctor's fund will be as follows:—On wages under 2*s.* per day, 4*d.* per month; on 2*s.* per day and upwards, the gross earnings being under £4 per month, 9*d.* per month; on earnings of £4 per month and upwards, 1*s.* per month. The payments to reading-room fund will be 4*d.* per month, payable by all men and boys over sixteen years of age. These payments will be deducted from the wages." At the time of the filing of the liquidation petition there were standing in the books of the firm, to the credit of the doctor's fund and the reading-room fund respectively, two sums of £149 and £63, which had arisen from deductions from wages, but which had not been paid over by the firm to the doctor or to the treasurer of the reading-room before the filing of the petition. The workmen, from whose wages the deductions had been made which were represented by these two sums, applied to the Court for an order that the trustee in the liquidation should pay over to them the above sums, in proportion to the deductions made from their wages respectively, as wages due to them, and entitled to preferential payment under sect. 32 of the *Bankruptcy Act*, 1869. In support of the application an affidavit was made by one of the workmen, on behalf of them all, in which he said, "The deductions were collected by the firm under a mutual arrangement with the workmen, and for convenience' sake alone, in order to save the great trouble of otherwise collecting the same. This arrangement was embodied in the regulations indorsed on the back of the monthly pay ticket. It was the duty of the firm to hand over such deductions from time to time in their entirety." There was no evidence of any contract in writing signed by the workmen authorizing the employers to make the deductions from the wages, nor was there any evidence that the doctor had agreed to accept the liability of the employers in respect of his attendance on the workmen. One of the debtors deposed that there was no contract between

his firm and the doctor. The Registrar made the order asked for. The trustee in the liquidation appealed.

A. T. Lawrence, for the Appellant:—

The workmen have had the benefit of the doctor's attendance, and cannot claim the fund which was intended to pay him. If the money was paid to them the debtors would remain liable to the doctor. The principle of the deductions is that the men who are in health shall pay for those who are sick; they have all a right to the doctor's attendance. The men, having allowed the deductions to be made, are under no personal liability to the doctor. The *Truck Act* (1 & 2 Will. 4, c. 37) (1), does not apply; the case

(1) By sect. 1 of the *Truck Act*, "In all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificers shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null, and void."

Sect. 2: "If in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void."

Sect. 3: "The entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivery to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void."

Sect. 4: "Every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm."

Sect. 19 enumerates the trades to which the Act is to apply, among them being "the making, casting, converting, or manufacturing of iron or steel, or any parts, branches, or processes thereof."

By sect. 23: "Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such

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is not within either the words or the mischief aimed at. Sect. 23 must be taken in conjunction with the earlier sections which require that wages shall be paid in coin, and then it is plain that sect. 23 was intended only to prevent the supply of things by the employer himself to the workmen. It does not touch a case like the present, where the doctor was an independent contracting party; it applies only to a case where the doctor supplies attendance and medicine as the agent or servant of the employer.

[EARL OF SELBORNE, L.C.:—What evidence is there that the doctor could have maintained an action against the men?]

He could have sued them if they had refused to allow the stipulated deductions to be made from their wages.

[EARL OF SELBORNE, L.C.:—It is so manifestly improbable that every individual workman should have entered into such a contract with the doctor that we ought to have clear evidence of it.]

The arrangement between all three parties amounted in effect to such a contract. No payment in kind was made by the employers; they paid the wages in coin monthly, and then by agreement a deduction was made for a particular purpose. Such a deduction is not contrary to the *Truck Act*: *Chawner* v. *Cummings* (1); *Archer* v. *James* (2); *Cutts* v. *Ward* (3). *Pillar* v. *Llynvi Coal and Iron Company* (4) is distinguishable.

Winslow, Q.C., and *Herbert Reed*, for the workmen:—

We only claim the amounts which have been carried to the credit of the two funds, but not applied in any way. If the employers had remained solvent the workmen could have claimed

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employer, from supplying or contracting to supply to any such artificer (*inter alia*) any medicine or medical attendance . . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect (*inter alia*) of any such medicine or medical attendance: Provided always (*inter alia*) that such stoppage or deduction shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer."

(1) 8 Q. B. 311, 323.
(2) 2 B. & S. 61.
(3) Law Rep. 2 Q. B. 357.
(4) Ibid. 4 C. P. 752.

these amounts. They represent wages due from the employers. They had entered into no contract with the doctor which made them liable to him, and it is clear there was no contract as to the reading room. Each workman could have sued the employers for the amount deducted from his wages, as for wages, and this being so the men are now entitled to preferential payment under sect. 32 of the *Bankruptcy Act*, 1869.

The deductions are clearly illegal within the *Truck Act*, there being no evidence of any agreement in writing signed by the workmen authorizing the making of the deductions: *Pillar* v. *Llynvi Coal and Iron Company* (1). Sect. 23 is a relieving section, but it shews what the Legislature intended by the previous sections; they intended payment of the wages to be made in coin in full, without any stoppage or deduction, unless the workman has authorized the deduction by an agreement in writing.

[COTTON, L.J.:—The argument against you is, that the workmen entered into an agreement with the doctor, and that the deduction was made by the employer at their request to relieve them from liability to the doctor.]

The sums deducted have not in fact been paid over to the doctor; no payment has been made by the employer at the request of the workmen. This is the foundation of our claim; the money has not been paid either to the workman himself, or to any one else at his request; it remained in the hands of the employers. We do not claim anything which has been actually paid over to the doctor or to the treasurer of the reading room.

[They were stopped by the Court.]

Lawrence, in reply:—

The agreement between the three parties amounts to payment of the doctor; he could not have sued the workmen. The employers held the sums deducted as agents for the doctor. Payment of a debt to an authorized agent of the creditor discharges the debt.

EARL OF SELBORNE, L.C.:—

I think the Registrar's order is right, and must be affirmed.

(1) Law Rep. 4 C. P. 752.

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It is clear that the sums in question are workmen's wages, and equally clear that they have not been paid in current coin of the realm. It was suggested that certain sums were payable by the workmen under contracts, which were in substance their contracts, to the doctor and for the purposes of the reading-room, and that by arrangement with the employers those sums were to be paid out of that part of the wages which had not been paid to the men. If that had been actually done and a settlement upon that footing had taken place, I am not, as at present advised, prepared to say that such a settlement could have been treated as a nullity by reason of the *Truck Act*. We are not called upon to decide the question now, because the facts do not raise it. All that appears by the evidence is that the workmen were desirous that what was in substance due from them to the doctor and for the reading room should be paid through the machinery of a retainer out of their wages, the amount thus retained being paid over by the employers. The employers have retained the amount out of the wages, but they have never paid it over, and there is no evidence to satisfy me that anything equivalent to payment to the workmen has taken place. Therefore I think the Registrar's order is right.

The argument has turned upon a point which appears not to have been raised in the Court below, and, under these circumstances, and looking to the general nature of the case, and the large number of persons who are represented, we think there should be no costs of the appeal.

COTTON, L.J.:—

I am of the same opinion. The order is for payment to the respondents of their respective proportions of two sums of £149 and £63, as having been deducted from their wages under the arrangement which has been referred to by the Lord Chancellor. But those sums so deducted from the wages have never in fact been paid over by the employers to the doctor or to the treasurer of the reading room, and therefore payment in cash of those sums has never been made. Now the Act provides that payment of wages shall be made only in cash, and so much of any wages as has not been paid in cash may be recovered by the workmen as wages.

That being so as regards these particular sums, which, though deducted by the employers from the wages of the workmen, have never been paid over to anyone, in my opinion the proof must prevail. But we do not in any way encourage the idea that our decision would apply (I desire to guard myself in this way, and I understand that the Lord Chancellor intended to do so) to any deduction made from the wages and in fact applied by the employers by the direction of the workmen, or in pursuance of an arrangement made with them, in discharge of a debt for which they were liable. That might possibly amount to a payment in cash, not to them, but to their agent, or a person appointed on their behalf to receive it. If again there were evidence that the employers had made themselves liable to the doctor, and he had accepted their liability, and had, consequently, no claim at all against the men, the case might have stood very differently. But I cannot find any evidence of that.

LINDLEY, L.J.:—

I am of the same opinion. It appears to me that the sum of £149 now standing to the credit of the doctor's fund, and the sum of £63 now standing to the credit of the reading room fund, are mere paper entries. They are sums in the hands of the employers carried to the credit of these accounts. They have not been paid to any one. They have not been paid to the workmen; they have not been paid to the doctor, nor to the treasurer of the reading room. They have not been paid to any agent of the workmen, but they are still in the hands of the employers. Under these circumstances it seems to me that sects. 3 and 4 of the *Truck Act* apply to the deductions.

Solicitors for trustee: *Hollams, Son, & Coward.*
Solicitors for workmen: *Marsland, Hewitt, & Everett.*

W. L. C.

C. A.
1884
Feb. 26, 28; *March* 1, 3, 24.

CROPPER *v.* SMITH.

[1881 C. 2207.]

Letters Patent—Estoppel—Particulars of Objection—15 & 16 *Vict. c.* 83, *s.* 41 [*Revised Ed. Statutes. vol. xi. p.* 485].

In 1873 letters patent for improvements in lace machines were granted to *H.*, who in 1877 went into liquidation, and the patent was sold by the trustee to the Plaintiffs. *H.* afterwards entered into partnership with *S.*, and this action was brought against *S.* & *H.* to restrain them from infringing the patent. By an order made when the action had come on for trial, it was postponed, with liberty to *S.* & *H.* to deliver specified objections. These were that *S.* & *H.* denied infringement, and that *S.* objected to the validity of the patent on the ground of want of novelty and insufficiency of the specification. From the cross-examination of the Plaintiffs' witnesses it appeared that one of the subsidiary combinations in the machine was not novel. The Court of first instance was of opinion that the patentee had not claimed this subsidiary combination as his invention, held the patent valid, and granted an injunction against both Defendants, and an inquiry as to damages. The Defendants appealed. The Court of Appeal held that on the construction of the specification *H.* had claimed the subsidiary combination as his invention, and that the patent was invalid, and that there being nothing to prevent *S.* from insisting on this objection, his appeal must succeed :—

Held, that *H.* was not estopped from disputing the validity of the patent, either by matter of record, on the ground that the letters patent were of record; or by deed, by reason of the specification being under his seal; or by matter *in pais*, on the ground of the statements in his petition to the Crown, there being nothing to shew that the plaintiffs bought on the faith of those statements.

But, *held*, that as *H.* had not delivered objections to the validity of the patent, evidence to shew that it was invalid for want of novelty could not be read on his behalf :

Held, also, by *Cotton* and *Fry*, LJJ. (*dissentiente*, *Bowen*, L.J.), that as *H.* had never asked for leave to amend his particulars of objection, but had to the last argued the case on the ground that no such amendment was necessary, leave ought not to be now given, but that his appeal must be dismissed.

IN the year 1873 letters patent were granted to the Defendant *Hancock* for improvements in lace machines. By the specification *Hancock* claimed, as was ultimately held by the Court of Appeal, not only the general combination which constituted his improved machine, but also two subsidiary combinations which formed parts of it.

In January, 1877, *Hancock* went into liquidation. The trustee in liquidation sold the letters patent to the Plaintiffs in April, 1877. *Hancock*, in November, 1880, took out another patent for improvements in lace machines, and in February, 1881, went into partnership with the Defendant *Smith*. The present action was commenced in May, 1881, against *Smith & Hancock*, to restrain them from infringing the Plaintiffs' patent.

On the 18th of May, 1882, the action was standing for trial, but on the application of the Defendants the following order was made:—"Upon motion made by counsel for the Defendants on the 17th day of May, 1882, for leave to sever in their defences, and this action standing this day in the paper for trial, in presence of counsel for the Plaintiffs and Defendants, and the Defendants, by their counsel, asking for leave to deliver particulars of their objections to the validity of the Plaintiffs' letters patent, this Court doth order that the Defendants be treated as having severed in their defence. And this Court doth order that this action do stand over, with liberty to apply to restore the same." Then, after giving leave to the Plaintiffs to discontinue the action on certain terms, it was provided that if the Plaintiffs should not within a month give notice to the Defendants of discontinuance, "the Defendants be at liberty to deliver to the Plaintiffs the particulars of objection specified in the schedule hereto, but without prejudice to any question at the trial of this action, as to the Defendants or either of them being estopped from objecting to the validity of the Plaintiffs' letters patent." The particulars of objection were as follows: "Take notice, that at the trial of this action the Defendants will deny that they have infringed the letters patent in the statement of claim mentioned, and the Defendant *Smith* will rely on their objections to the validity of the said letters patent, on the ground of want of novelty and insufficiency of the specification, and that the matters claimed, or some of them, were not good subject-matter, and will further contend that the invention, as described and claimed in the specification of the said patent, or material parts thereof, were, prior to the date of the said patent, publicly used at the times and places and in the manner more particularly hereinafter set forth, that is to say," &c., &c.

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The Plaintiffs did not discontinue, and the above objections were delivered.

At the trial it was established, by cross-examination of the Plaintiffs' witnesses, that the second of the subsidiary combinations was a well-known old combination, though it had never before been applied to lace machines. Mr. Justice *Pearson*, on the 5th of March, 1883, held that the specification was sufficient, and held, upon its construction, that the patentee only intended to claim the entire combination, and that by the third claim he was merely intending to give a more full description of a part of his machine, and not to claim that subsidiary combination as his invention. His Lordship accordingly held the patent good, and gave judgment against the Defendants on that footing, for an injunction and a reference as to damages, considering it to be clearly established that, if the patent was good, the machine which the Defendants were using was an infringement of it. The Defendants appealed, and the appeal was heard on the 26th and 28th of February and the 1st and 3rd of March, 1884. The case, so far as relates to the validity of the patent, is not considered to call for a report, as it turned only on the question whether on the construction of this particular specification the patentee was to be taken to claim the subsidiary combinations as separate inventions in respect of which he was to be entitled to a monopoly, it not being disputed that if he had done so the letters patent were invalid.

Aston, Q.C., and *Goodeve*, for the Appellants, contended that the second and third claims were distinct substantive claims, and that as the combination in the third claim was old the patent was bad.

Davey, Q.C., *Barber*, Q.C., *Chadwyck Healey*, and *Cann*, for the Plaintiffs, after arguing that the patent was good, and that the judgment ought to be affirmed, opened a special case against *Hancock*:—

Hancock has given no particulars of objection. No evidence, therefore, of the invalidity of the patent is admissible on his behalf: 15 & 16 Vict. c. 83, s. 41. The evidence which shews

want of novelty of the third subordinate combination cannot therefore be read for him, and his appeal must fail. Again, we say that he is estopped from denying the validity of the patent. (1.) He is estopped by the letters patent, which are of record: *Com.* Dig. (1). (2.) There is also estoppel by deed; the specification being under seal. There may be estoppel by deed-poll: *Shepp.* Touchstone (2); and there is estoppel in the present case: *Bowman* v. *Taylor*, per *Taunton*, J. (3); *Co. Litt.* (4); *Oldham* v. *Langmead* (5); *Chambers* v. *Crichley* (6). (3.) There is estoppel by matter *in pais*, for *Hancock* cannot dispute the allegations in his petition to the Crown, by which he obtained the letters patent: *Smith's* Leading Cases (7); *Carr* v. *London and North Western Railway Company* (8); *Crossley* v. *Dixon* (9).

Aston, in reply:—

[COTTON, L.J.:—We only require to hear you on the points whether *Hancock* is at liberty to say that his representation to the Crown that his invention was novel was a misrepresentation, and whether, not having delivered objections to the validity of the patent, he can avail himself of evidence to shew its invalidity.]

Hancock can only be treated as having said to the Crown that he believed the invention to be a new and useful invention. He did believe it, and there is no estoppel in that. He did not know at the time that the use for other purposes of the combination for which the third claim is made took it out of the category of inventions. There does not appear to be any case as to the position of a patentee who has become bankrupt; but there are cases which throw some light upon it by way of analogy. In *Walker* v. *Mottram* (10), where the goodwill of a business was sold in bankruptcy, the effect of assignment in bankruptcy was held to be very different from that of assignment by the bankrupt himself. He is not subject to the same equities as if he were the assignee.

(1) Vol. iv. p. 189.
(2) Page 53.
(3) 1 Web. Pat. Cas. 293.
(4) Page 352 a.
(5) 3 T. R. 439, n.
(6) 33 Beav. 374.
(7) 8th Ed. vol. ii. 879.
(8) Law Rep. 10 C. P. 307.
(9) 10 H. L. C. 293.
(10) 19 Ch. D. 355.

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[BOWEN, L.J.:—Does not the patentee state as facts that the invention is new, and that he is the inventor?]

No; he only, in fact, states his belief, and moreover there is nothing to shew that the Plaintiffs bought on the faith of anything he said in his petition. Purchasers do not buy a patent on the faith of any such statement. Then, as to the second point, *Hancock* denies infringement. Now "infringement" does not mean making something described in letters patent, but violation of a patent right. Notice of denial of infringement is, therefore, a denial of any act which infringes a patent right, and includes objections to the validity of the patent. It was, therefore, unnecessary for *Hancock* specifically to say that the patent was bad. If the Court in favour of *Smith* holds the patent void, how can it in the same action grant relief against *Hancock* under a patent which it decides to be invalid. The evidence on the ground of which the patent is held invalid was not adduced by *Hancock*, but comes from the Plaintiffs' own witnesses. There is no reason, therefore, why the Court should not treat it as available to *Hancock*.

The Court, at the conclusion of the argument, gave judgment on the general question as to the validity of the patent. The Court was of opinion that, on the construction of the specification, the patentee had claimed the second subsidiary combination as his invention, and that as it was not novel the patent was void, but their Lordships reserved judgment on the question which of the Defendants were at liberty to dispute the validity of the patent.

1884. March 24. COTTON, L.J.:—

In this case we determined on a former day that, as against any one of the Defendants who is now entitled to take the objection, the patent now vested in the Plaintiffs was bad, on the ground that one of the subordinate combinations which we considered to be claimed by the patentee in his specification as part of his invention was not novel; but we reserved for consideration the question which of the Defendants were entitled to take that

objection. As regards the Defendant *Smith* there is no reason why he should not take it, and his appeal therefore succeeds.

But as regards the Defendant *Hancock* the case stands in a peculiar position. *Hancock* was the original patentee, he went into liquidation, and the Plaintiffs bought the patent from his trustee in liquidation. Several grounds were taken against *Hancock's* being entitled to rely on the objection which we held to be fatal to the validity of the patent, the first, which divides itself into three sub-divisions being that the patentee was estopped from denying the validity of his own patent. Mr. *Barber* put it that there were three valid grounds; namely, estoppel of record, estoppel by deed, and estoppel *in pais*.

The estoppel on the record was of course alleged to arise from the letters patent which were recorded. But besides the objection that estoppel is only as between parties and privies, there is nothing in the patent which is inconsistent with *Hancock's* alleging, if he is otherwise in a position to do so, that the specification was not a good one, and that the patent was invalid on the ground of want of novelty. Estoppel arises only from something by which the man who is estopped is prevented from alleging and proving the truth, he being bound by that which estops him from denying that certain allegations are true. As regards the estoppel on the record, therefore, in my opinion there is no ground for the argument.

Then we come to estoppel by deed, namely, the specification which was by deed-poll; but in my opinion there is nothing in the specification which prevents *Hancock* from alleging the truth and from proving the truth, for all that the specification professed to do was to fully declare the nature of the invention and how it was to be carried into effect. It may be that he would be estopped by the specification from taking certain objections. On that we give no opinion, but in my opinion there is nothing in the specification inconsistent with his now shewing that one of the subordinate combinations which he claimed as part of his invention fails for want of novelty.

Then it was urged that he was estopped by the petition which he presented to the Crown, because there he represented that this invention was a new invention, and that this representation must

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apply to the whole of the invention for which he claims protection in the specification. That would, in my opinion, so far as it is necessary to give an opinion on the point, be as good as an estoppel *in pais* as against any one who is proved to have acted in reliance on the statements in the petition, but here there is no evidence at all that the Plaintiffs relied on any statement made by *Hancock* in his petition. The Plaintiffs gave a very small sum for this patent, and as a rule people do not rely on any statement made by the patentee, but they buy the patent, forming their own opinion as to its worth, taking their chance (unless it has been established) of their being able to establish its validity if the question comes before a Court of law.

In my opinion, therefore, the objections raised by the Plaintiffs on the ground of estoppel fail.

But there is another more serious objection to be considered, viz., that by the Act of 15 & 16 Vict. c. 83, s. 41, it is enacted that the defendant in any action for the infringement of letters patent shall deliver with his pleas particulars of any objections on which he means to rely at the trial in support of the pleas, and that at the trial of such action no evidence shall be allowed to be given in support of any objections impeaching the validity of the letters patent which shall not be contained in the particulars so delivered.

Now the objection which we have held to prevail is one which in my opinion could not be decided without evidence. We required evidence to shew whether the subordinate combination which we held not to be novel, had been used, if not in these machines, in other machines, so that there could be no sufficient invention in applying it to lace machines. It was said on behalf of *Hancock* that the evidence on that subject was evidence given by the Plaintiffs. It was not. It is true that it was evidence elicited on cross-examination of the Plaintiffs' witnesses, but it was evidence which did not go to the credit of those witnesses, it was evidence brought in by the Defendants, although it was obtained by the cross-examination of the Plaintiffs' witnesses, and it was admissible only as being relevant to an issue which was to be decided by the Court. At the time when that evidence was put in, the two Defendants, although they had severed in their defence,

appeared by the same counsel, and if it had only been *Hancock* who had sought to introduce this evidence, then, in my opinion (since he has not delivered objections, as I shall presently shew that he has not) it ought not to have been admitted by the Court. It is evidence without which we could not have decided this case, and evidence of which *Hancock* cannot avail himself. In my opinion, therefore, subject to what I shall now consider, *Hancock* cannot avail himself of the invalidity of the patent.

I have now to consider the order which was made when the case came on in the first instance for trial. [His Lordship read the order of the 18th of May, 1882.] The particulars of objections are these—"Take notice that at the trial of this action the Defendants will deny that they have infringed the letters patent in the statement of claim mentioned." Mr. *Aston* contended that this in itself was notice that both the Defendants intended to rely on objections to the validity of the patent. In my opinion that was a sort of *tabula in naufragio* attempted to be seized, because it is well known that a contention that there has been no infringement is entirely distinct from an objection that the patent is bad. It is true that a judgment given on the footing of there having been an infringement assumes that, either by the confession of the Defendants, from their not having raised the objection or otherwise, or from the decision of the Court, the patent is to be treated as good, but a notice denying infringement means "even assuming your patent is one which you have a right to the assistance of a Court of law to enforce, I have not done anything which is an infringement of the privilege granted to you." Then there is a break in the particulars. "And the Defendant *Smith* will rely on their objections to the validity of the said letters patent on the ground of want of novelty and insufficiency of the specification." We therefore have it distinctly stated that both the Defendants intend to rely on there having been no infringement, but the language is then changed, and it is "the Defendant *Smith* will rely on their objections to the validity of the said letters patent." The word "their" is remarkable, and possibly may shew that at one time they both intended to ask for leave to put in objections to the validity of the letters patent, but for some reason satisfactory to *Hancock* he

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determined not to ask for it. That being so, in my opinion, he is not entitled, as matters now stand, to rely on this objection which has proved fatal to the Plaintiffs' title. Ought, then, any relief to be granted to him by giving him liberty to amend or otherwise? In my opinion it ought not. The deliberately taking the order in this form shews, in my opinion, a deliberate intention on his part not to raise any objection to the validity of the patent. He may have thought that if his co-Defendant *Smith* could raise the objections the Court would give him the benefit of them. In my opinion we cannot. We must treat that evidence on which we are enabled to find that there was a want of novelty, which was a fatal objection, as not his evidence but evidence which he was not entitled to put in, and as he has done this deliberately, and has not even at the last moment asked for liberty to amend, but relied on the argument with which I have already dealt, that raising the question of no infringement raised the question of want of novelty, it would, in my opinion, be wrong to give him liberty to amend, even on the terms of his paying all the costs up to the present time. In my opinion, therefore, the judgment against *Hancock* in the Court below ought not to be disturbed, and his appeal must fail, although the appeal of *Smith* must be sustained, and the judgment of the Court below as against him must be reversed.

BOWEN, L.J.:—

I am so unfortunate in this case as to be at variance with the rest of the Court as to the judgment which should be given, and I need hardly say that I feel very great diffidence in expressing my own views as against the views of those whose opinions I respect more than I do my own, but at the same time, as I am one of the Judges of the Court, I must state my own honest opinion about the matter.

So far as the estoppel is concerned the whole of the Court is at one. I think it is quite clear that there is no estoppel here. There is no estoppel of record between *Hancock*, the original patentee, and the person who has bought from his trustee in liquidation, and there is no estoppel by deed, because the people who claim against *Hancock* are not parties or privies to the deed

or to the record. Nor is there estoppel *in pais* or by matter of conduct, for the best of all reasons. It is true that in his petition to the Crown, *Hancock* stated that his invention was new, but what sensible being in this world who buys a patent buys it on the strength of the assertion made by the patentee that the invention is new? We know that a person who buys a patent generally takes it for what it is worth, and there is absolutely no evidence in this case that the Plaintiffs, who bought from the trustee in liquidation, and who gave a very small sum for the patent, relied in the least on the allegations made in the petition to the Crown by the patentee that the invention was novel.

Then as to whether an action for an injunction is maintainable, whether the right of the liquidating debtor to manufacture his own invention passed to his trustee is a curious question. I do not differ from the view of the rest of the Court on this point. It is not necessary for the purpose of my judgment for me to express any opinion on the subject. As at present advised, I incline to think that there is no estoppel, and *Hancock* was entitled to set up in the action the defence that his invention was not new when he took out his patent.

Now what judgment ought to be given. This is an action against *Hancock* and his partner for infringing a patent which the Court decides to be invalid. The Court refuses to restrain the partner from infringing a right which does not exist, and all the rest of the world are at liberty to manufacture freely this invention. Yet we are now asked to shut out *Hancock*, and to enjoin him for ever from infringing a right which does not exist, and to compel him to render an account of the profits to persons to whom they do not belong. Now upon what ground do the Plaintiffs' counsel ask us to take this line—a line which may entail endless consequences upon the unhappy *Hancock*, because I do not know how it will affect his articles of partnership? Upon the ground that in the notices of objection which were delivered in the action *Hancock* did not set up that his patent was void for want of novelty, but left his partner to fight that part of the case. They severed in their defences, but were represented by the same counsel, and they delivered on the same piece

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of paper notices of objection. The partner said that the patent was bad. *Hancock*, I suppose, for some reason or other, did not like to say that his own patent was bad for want of novelty. At all events he did not do it, and he left that part of the case to be fought by his partner. I cannot see what possible ground he could have for thinking that he would gain any advantage thereby, unless it was the simple advantage of escaping from the prejudice which a man creates against himself who says that his own patent is invalid. If we could analyse the case thoroughly we should probably find that his advisers imagined that there was an estoppel, and that this was a good objection in the mouth of that partner, but was not a good objection in the mouth of *Hancock*, and thought that for tactical purposes it was more prudent to let the fight be fought by the partner who could fight it, than set it up on behalf of *Hancock*. What injury did that do to anyone. *Smith* had to fight the case. *Hancock* lay by and said nothing. Now it is true that under 15 & 16 Vict. c. 83, s. 41, you must give notice of an objection to the validity of the patent if you wish to raise the objection, but there is a power even in that statute for a Judge at Chambers to amend, and to allow you at the last moment to cure any laches or error of judgment, and what a Judge could do at Chambers, a Judge could do in Court. Moreover, every power of amendment given by the *Judicature Act* seems to me to be applicable to this kind of suit as well as to any other. Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. Order XXVIII. rule 1, of the Rules of 1883, which follows previous legislation on the subject, says that, "All such amendments

shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. It was said by Mr. *Barber* in his very powerful speech to us, "You are taking away an advantage from the Plaintiffs who have got judgment below, by making an amendment at the last moment." In one sense we should be taking away an advantage from them, but only an advantage which they have obtained by a mistake of the other side, contrary to the true bearing of the law on the rights of the parties.

The question seems to me to be this, Can you by the imposition of any terms place the other side in as good a position for the purpose of having the question of right determined as they were in at the time when the mistake of judgment was committed? It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to overreach. There is no rule that only slips or accidental errors are to be corrected. The rule says, "All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy." I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine. Here I fail even to see that the Respondents want costs to remedy any grievance, because they have been put to none. The case has been fought exactly in the same way as it would have been fought if Mr. *Hancock* had delivered particulars of objection, and therefore it seems to me that he ought to be allowed to amend.

I reserve to myself the right to consider how a case should be dealt with where there has been not merely a mistake but an attempt to mislead. I do not see here any attempt to mislead. I do not see any moral iniquity in letting your partner fight a

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point about the validity of your own invention. It may be bad taste, but the Court, according to my view, does not exist for the purpose of punishing bad taste.

Then it is said he has not asked for leave to amend. He certainly did not ask leave in the Court below. It was not necessary, because the Judge was deciding against him on another point. In this Court, although he may not have asked leave in so many terms, I think the true effect of what has been done by Mr. *Aston* was to argue that it was not necessary for him to ask leave, but I think he has impliedly asked for leave and is entitled to obtain it.

I am perfectly sensible that the view of my learned Brothers is more likely to be right than my own, but in my opinion the order ought to be, that, Mr. *Aston* applying for leave to make any necessary amendment, the action against *Hancock* should be dismissed, *Hancock* paying the costs below, and no costs of this appeal being given.

FRY, L.J.:—

Immediately after the hearing of this appeal we determined that the injunction against the Defendant *Smith* could not be maintained, on the ground that the third claim in this specification was bad for want of novelty. The questions which we reserved for consideration were whether the Defendant *Hancock*, the original patentee, was in the same position as the Defendant *Smith*, or whether he was precluded from denying the invalidity of the patent, either on the ground of estoppel, or by reason of his not having delivered any notice of objection to the validity of the patent.

The question of estoppel was argued on three grounds, first, estoppel by record from the effect of the letters patent; secondly, estoppel by deed from the effect of the specification under the hand and seal of the Defendant *Hancock;* and, thirdly, estoppel *in pais* by reason of the allegations contained in his petition to the Queen.

That there would be an estoppel by record between the Crown and a grantee of its letters patent is I think probable; but I find neither reason nor authority for extending this estoppel so as to

make it work between the grantee and all other Her Majesty's subjects. The Plaintiffs claim as assigns of the grantee not of the grantor, and consequently can have no benefit of an estoppel against the grantee.

As to estoppel by the specification, it was argued that estoppel may arise between the maker of a deed-poll and all to whom it is addressed, in this case all men. But I am not able to find in the specification either an expressed or implied assertion of the validity of the third claim in the specification, the object and scope of the specification being merely to give the best description which the patentee can give of his invention.

Lastly, as to estoppel by the petition. The petition must, I think, be taken to be an assertion of the discovery by the Petitioner of a new invention capable of being made the subject-matter of a patent, and if it had been shewn that the Plaintiffs had purchased on the faith of this assertion by the Defendant, it may well be that the Defendant would have been estopped. But there is no evidence from which I can conclude that the Plaintiffs did so purchase, and consequently this head of estoppel, in my opinion, fails like the other two.

It remains to consider the effect of no notice of objections to the validity of the patent having been given by the Defendant *Hancock*.

Under the joint operation of the 41st section of the *Patent Act* (15 & 16 Vict. c. 83) and the order made at the trial of this cause, I am of opinion that no evidence could be adduced or received on behalf of *Hancock* to shew the invalidity of the letters patent, and I am of opinion that this incapacity applies equally whether the evidence be tendered by way of examination in chief or cross-examination.

It follows that Mr. *Hancock* cannot insist on the invalidity of the patent unless there be some ground of invalidity capable of being judicially determined by the Court in the absence of evidence. It was contended that such was the case here, and that the Court ought without evidence to hold that the subject-matter of the third claim was not a good subject-matter of a patent. We have already determined that claim to be bad on

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the ground of want of novelty. But I am of opinion that if the combination of the floor-plate with the vertical supports had been new in the history of machinery, it might have been a very important invention, and a good subject-matter of a patent, and consequently that we could not in the absence of all evidence have arrived at the conclusion that the third claim is bad.

It is argued that if the Court concludes the patent to be bad as against *Smith*, it cannot, on the footing that the patent is good, grant relief against *Hancock*. But I see no force in this objection, because every issue of fact in litigation must be determined with reference to the evidence admissible for and against each litigant respectively, and the admissions made by each litigant respectively, and as this evidence and these admissions vary, so the conclusions of the same issue may vary as against the separate parties including co-defendants. In the present case the Defendants have deliberately taken different courses. *Smith* has applied for and obtained leave to place himself in a position to give evidence to shew the invalidity of the patent; *Hancock* has by the limited nature of his application precluded himself from tendering such evidence. It is upon that evidence on behalf of *Smith* that I conclude in *Smith's* favour, and from the absence of all such evidence on behalf of *Hancock*, that I conclude against *Hancock*.

It is true that in the present case the two Defendants appeared by the same counsel, and put in the evidence, without, so far as appears, specifically indicating on whose behalf it was tendered. But as they thought fit to pursue this course after having obtained leave to sever and had put in different notices of objection, it appears to me to be the duty of the Court to consider that evidence which was competent to both Defendants, as put in for both, and that which was competent to *Smith* alone, as put in on his behalf alone.

I now approach the remaining question, which is simply this, whether under the circumstances, at this eleventh hour, the Court ought to give *Hancock* leave to amend the particulars of objection. I agree with the view taken by Lord Justice *Cotton*, and differ, though with diffidence and regret, from the view taken by

my learned brother, Lord Justice *Bowen*. In the first place, it seems to me that the leave to amend never was asked for. Mr. *Aston*, although almost invited to ask for leave, remained silent as regards any such application, and took a course of argument totally inconsistent with asking such leave, for he argued with pertinacity and ability that the notice of objections was sufficient to raise the point, and therefore, so far from asking for leave, he insisted that the point was open to him without leave. In the next place, it must be observed that, if the leave had been asked for, it would have been the duty of the Court to inquire carefully whether it should be given or not, and that, to a great extent, would, in my judgment, have depended upon what took place in the Court below, when the limited order was made which has resulted in the curious conclusion at which we have arrived. If it was evident that, when the application was made in the Court below, *Hancock* deliberately, whether from feelings of honour or from any other motive, confined himself to asking for leave to raise the question of infringement, I for one should have been very unwilling to have allowed him at the last moment to alter that course, and if it appeared that he was really endeavouring to fight under the shield of his partner so as to gain a benefit which he did not think he ought to gain in his own name, then I for one should have been very unwilling to grant him any leave of amendment at this late hour. But what I rely on is this, that no application ever was made for leave to amend; that the Defendant's counsel took the opposite course and insisted that the leave obtained was sufficient; and, therefore, we never have been placed in a position to determine whether if the leave had been asked for we ought to have granted it. I do not think that it is the duty of the Court to force upon a party who, although almost invited to apply, does not apply for leave to amend, an amendment for which he does not ask. On that ground I agree that the decision in the cases of *Smith* and of *Hancock* must be different. I think, therefore, that the view which my learned brother Lord Justice *Cotton* has expressed with regard to the costs is the just one, that is to say, the Defendant *Smith* must have his costs both in the Court below and in this Court, and *Hancock* must pay the costs in the Court below and the costs of

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the appeal. How the costs will be apportioned by the Taxing Master I do not presume to suggest.

Barber, for the Plaintiffs:—

The question remains, how the damages which have been paid are to be dealt with. They were assessed by the official referee at about £700, and payment was obtained by execution against the partnership property.

Goodeve, for *Smith*:—

I ask that the damages should be returned. How can damages be given for infringement of a void patent.

COTTON, L.J.:—

As against *Hancock* the Plaintiffs are entitled to damages, and we cannot order them to be refunded. If they have been paid out of the partnership estate that is a matter of account between *Smith* and *Hancock*. We make no order as to them, but nothing that we say is to prejudice any application by *Smith* for an order as between him and *Hancock*, or any such other application as he may be advised to make as to the damages. We do not, however, encourage any such applications.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *F. Needham; Marsland, Hewitt, & Everitt.*

H. C. J.

WHYTE *v.* AHRENS.

C. A.
1884
V.-C. B.
March 5.
C. A.
April 9.

[1883 W. 4239.]

Practice—Discovery—Production of Documents—Rules of Supreme Court, 1883, *Order* XIX., *r.* 6; *Order* XXXI., *rr.* 12, 20 — *Opening Settled Account — Allegations of Fraud.*

The Plaintiffs employed the Defendants to purchase goods, as their agents, at the lowest possible prices. The Plaintiffs sued for an account, and in their statement of claim alleged that the Defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. The charges against the Defendants were stated in general terms, no particulars being mentioned. The Defendants denied the charges, and pleaded a settled account. The Plaintiffs applied for production of documents:—

Held, by *Cotton*, L.J., affirming the decision of *Bacon*, V.C. (*dissentiente*, *Fry*, L.J.) that the Plaintiffs were not bound to give particulars of fraud under Order XIX., rule 6, before obtaining discovery of documents:—

Held, by *Fry*, L.J., that the allegations of fraud in the pleadings not being sufficient to enable the Plaintiffs to open a settled account, discovery ought to be refused until the allegations had been made sufficient.

THIS was an action brought by the Plaintiffs, who are a firm of general merchants in *London*, against the Defendants, who were a firm carrying on business at *Japan*. The Plaintiffs employed the Defendants as their agents to purchase Japanese goods at the lowest possible prices, and forward them to *England;* and the Plaintiffs accused the Defendants of purchasing the goods at prices higher than the current prices, and of secretly receiving from the vendors allowances or commissions and otherwise making a profit to themselves by their dealings. The charges against the Defendants were stated only in general terms, no particulars being mentioned. The Plaintiffs claimed an account of the receipts and payments of the Defendants in respect of all purchases made on behalf of the Plaintiffs, and asked that the Defendants might be charged with all profits and emoluments which they had made in the various transactions.

The Defendants in their defence denied the statements made by the Plaintiffs, and also pleaded a settled account in bar of the action.

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The Plaintiffs, before putting in a reply, took out a summons for discovery of documents, under Order XXXI., rule 12. The summons was adjourned into Court.

The Defendants also applied for particulars of the frauds alleged, but the application was ordered to stand over.

The summons was heard before Vice-Chancellor *Bacon* on the 5th of March, 1884.

Marten, Q.C., and *Chester*, for the Plaintiffs.

Stirling, for the Defendants.

BACON, V.C.:—

In my opinion the Plaintiffs are clearly entitled to the discovery which they ask for, upon the settled practice of the Court, which practice has not been altered, though it has been somewhat modified by the new rules. The allegation of the Plaintiffs is this:—You were our agents, you were employed to do certain things for us, you committed frauds in the execution of the task we allotted to you. They say we were your agents, and we did not commit those frauds, and they say, besides, the accounts are settled. Mercantile accounts are very commonly so described, but always contain the stipulation that errors are excepted. Now, when the issue raised in the last paragraph of the statement of defence comes to be tried the Plaintiffs want the discovery in order to meet the plea. If they can falsify the accounts they have a right to do so, and they cannot proceed to do that unless the account is furnished to them.

The 6th rule of Order XIX is as follows:—"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading; provided that if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading."

The Plaintiffs' case is that they are unable to state particulars,

but they state general facts, which they undertake to prove, facts which the Defendants in their answer deny. The Plaintiffs say: "Shew us the papers in your possession that we may be able to prove as much as we can of the particulars which we mention." The particulars are enough, they are all that the Plaintiffs can furnish. There are no particulars that they can prove, but what are contained in the Defendants' books. If the new order is read as if it were necessary for the party complaining to prove every particular in which it is said that a fraud had been committed on him, there would be an end to all such actions. The relation of principal and agent gives the Plaintiffs a *primâ facie* right to discovery. The rule says you shall particularize. They have particularized. They say they have not given evidence because they cannot, but if the Defendants furnish them with the papers or books of accounts they will then give the particulars, and shew more distinctly the grounds on which they claim to be entitled to relief. The settled account is no answer to that right of discovery, and the discovery may be directed subject to the alleged settled account. In my opinion the ordinary order for production ought to be made.

From this order the Defendants appealed. The appeal was heard on the 9th of April, 1884.

Stirling, for the Appellants:—

The Defendants have pleaded a settled account, and if that is proved there is an end to the action. Therefore there is a preliminary question to be tried before discovery can be granted. The statement of claim alleges fraud, but the Plaintiffs have given no particulars, as they ought to have done under Order XIX., rule 6. Even admitting that this order might have been made under the old practice, the practice has been modified by the new rules, and the Judge ought, under Order XXXI., rule 20, to have refused discovery until the question of a settled account has been determined. Under the old practice it was always necessary, in order to open a settled account, to allege and prove some item of fraud: *Parkinson* v. *Hanbury* (1); and there has been no alteration in this rule.

(1) Law Rep. 2 H. L. 1.

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Marten, Q.C., and *Chester*, for the Plaintiffs :—

The nature of the fraud charged is sufficiently shewn by the statement of claim. It is impossible to give details of the fraud until we have obtained discovery of the books of the Defendants. The Defendants admit their fiduciary position, and are therefore bound to account. In *Dickson* v. *Harrison* (1), which was a similar case to this, discovery was given. *Dawson* v. *Dawson* (2), *Williamson* v. *Barbour* (3), and *Davy* v. *Garrett* (4), are in our favour.

Stirling, in reply.

COTTON, L.J. .—

This is an appeal from an order of Vice-Chancellor *Bacon*, by which he ordered the Defendants to make the ordinary affidavit of documents.

Now the Plaintiffs' case is that the Defendants in *Japan* agreed to buy certain goods on a joint speculation or on account of the Plaintiffs, to buy them at the lowest possible prices, and that in fact what they did was this, they did not buy at the lowest possible price, they received commissions from the vendors, and failed to account for them. The Defendants have pleaded a settled account, but, as was necessary for them in order to support that plea, they traversed the allegations of fraud which were contained in the statement of claim. The Defendants say that this order ought not to have been made by the Vice-Chancellor upon the ground that before the production of all their books is made it ought to be decided whether or no there is a settled account between the parties, which of course would be conclusive. It was conceded by Mr. *Stirling*, as in fact I should have expected it to be, that according to the old practice in the Court of Chancery upon this statement of claim, which does not contain such specific charges of fraud as would enable the Defendants to be ready at the hearing to meet them, production would have been ordered of the books which were material to the question whether there had been such fraud as would prevent the plea of settled account.

(1) 26 W. R. 730.
(2) 1 Atk. 1.
(3) 9 Ch. D. 529.
(4) 7 Ch. D. 473.

But reliance is placed on two orders, the first being Order XXXI., rule 20. That is in these terms: "If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection." It is said that alters the case, and it is suggested that this motion ought to stand over till the question of settled account is determined. In my opinion this rule 20 does not do more than give the Judge a discretion as regards such matters. In some cases it may be perfectly right that when there is a plea which would prevent the necessity of the discovery, which would be a bar to the right of the discovery, that should be settled first. But, in my opinion, if that is so, it ought not in the present case to prevent the Court from granting the production of these documents. The production of these documents is most essential for the purpose of enabling the Plaintiffs to determine whether that plea is true or false. That being so, if there is here a discretion given to the Court larger than it had in former days, this is not a case, in my opinion, in which that discretion should be exercised by refusing, at this stage of the case, that production which, according to the old practice, would have been made.

But then it was said that if this goes to the hearing, there being no particular allegation of fraud, the Plaintiffs, even if they proved any particular items of fraud, would not be entitled to set aside the account. I will assume that that is so, though I doubt whether there are not particular statements of fraud. But assume that that is so, then Order XIX., rule 6, is relied on, which says that a party must state in his pleadings, if he relies on fraud, the particulars of that fraud. Here there has been an application for particulars, and that application has been ordered to stand over till the production of those books. Taking the two together, I

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think that is right. The production of the books will enable the Plaintiffs to define and state what it is they require the Defendants to meet at the hearing, and they must do that before the hearing, in order to enable the Defendants to meet it. But as it is conceded that according to the old practice in this state of the pleadings an order would have been made for the production of documents material to the question to be tried at the hearing, though at present, from ignorance of what has taken place, the Plaintiffs are not able to particularise them, so here, in my opinion, the Judge was right in saying, notwithstanding the discretion given him by rule 20 of Order XXXI., that he would make an order for the production of the documents, and in not confining or restricting it to those documents protection as to which would in no way be gained if the plea were established. In my opinion the order of the Vice-Chancellor was quite right.

FRY, L.J.:—

I have the misfortune to differ not only from the opinion of my learned colleague but also from the opinion of the Vice-Chancellor in this case. I think that the order of the Vice-Chancellor was wrong.

The general scope of the rules and the decisions which have been referred to shew that the intention is that discovery, in the first place, should be given only with regard to the matters which first require to be tried, and that, therefore, discovery in the first instance should be confined to the matters which are particularly alleged in the statement of claim. If the trial of the action results in a judgment, the ancillary discovery should be had to assist that judgment.

In the present case it becomes necessary to inquire what would be the questions to be tried. The Plaintiffs allege that the Defendants have been guilty of fraud in receiving commissions which they have not accounted for, and in buying at one price and representing that they had bought at another. The Plaintiffs do not condescend to give any particulars with regard to that fraud. They do not define any particular transaction in which the fraud is said to have occurred either by reference to amount

or by reference to time, or by any other particular designation. It appears to me that such a mode of statement is not adequate for the hearing of the cause. It is not adequate for the purpose of opening a settled account. I come to that conclusion for two reasons. In the first place, I think the old rule of pleading with regard to opening a settled account is well determined, and is well stated in the head-note to the case of *Parkinson* v. *Hanbury* (1). "Where a plaintiff seeks to open a settled account, there must be in the bill a distinct statement of specific errors in the account." In that case Lord *Westbury* (and the other learned Judges adopted his view) said (2): "Nothing is more requisite than to abide by the old rule, clearly enunciated by Lord *Hardwicke*, and constantly followed, that if you desire to set aside, or to open, a stated and settled account, so as to have liberty to surcharge and falsify, you must, in your bill, specially charge some, at least one, definite and important error, and support that charge with evidence, confirming it as it is laid." My recollection of the practice is in exact accordance with that statement. Then, if I turn to the modern rules with regard to pleading, I think the same conclusion is arrived at. I think Order XIX., rule 6, which prevails now has the same result in this case. It provides that "In all cases in which the party pleading relies on any fraud or breach of trust" (I am only reading the words necessary), "and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars with dates and items, if necessary, shall be stated in the pleadings." It appears to me, in the present case, the rule would require a statement in the pleadings of a particular error or errors, or fraud or frauds, or suppression of moneys received: in fact a distinct allegation of the specific error. Therefore, I think the pleadings are not adequate for the trial of the particular issue. I think they ought to be made adequate before the relief by way of discovery is given, and that the relief should be confined to the particular matters put in issue.

I need not say that, differing as I do from my learned brother, in all probability I am wrong; but the matter is of so much importance that it appeared to me to be my duty to state the result

(1) Law Rep. 2 H. L. 1. (2) Law Rep. 2 H. L. 19.

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at which I have arrived, and the reasons which guided me to that result. As the Court is divided, the order of the Vice-Chancellor will stand.

The appeal will be dismissed, and dismissed with costs.

Solicitors: *Wright, Bonner, & Wright; Clements.*

M. W.

C. A. 1884 KAY, J. *Feb.* 13. C. A. *April* 9, 25.

ROBERTS *v.* OPPENHEIM.

[1882 R. 608.]

Practice—Production of Documents—Affidavit—Documents referred to in Pleadings—Rules of Supreme Court, 1883, *Order* XXXI., *r* 15.

Where a party claims privilege against the production of documents on the ground that they support his own title and do not relate to that of his opponent, his affidavit must be taken as conclusive, unless the Court can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents.

Attorney-General v. *Emerson* (1) distinguished.

The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards be used in evidence.

The decision of *Kay*, J., affirmed.

THE Plaintiffs in this action claimed to be respectively entitled for various estates and interests, making up the entire fee, to certain houses in *Winkworth's Buildings, Austin Friars*, and to the soil of a forecourt in front of those houses, and they sought a declaration of their title to the soil of such forecourt, an injunction to restrain the Defendant from trespassing upon the said forecourt by building, and an order for the removal of certain erections which the Defendant had placed thereupon.

In their statement of claim, the Plaintiffs referred to certain documents in the following manner:—

Par. 4: From certain abstracts and muniments delivered to the Plaintiffs on their respective purchases as part of the evidence of title to the said messuages (particularly by the recitals of two deeds dated the 3rd of March, 1790, and the 19th

(1) 10 Q. B. D. 191.

of January, 1801) it appears that by indenture dated the 29th of June, 1702, four houses, and land, in *Austin Friars*, were, &c.

Par. 5: From the said indenture, dated the 19th of January, 1801, it also appears that since the said 29th of June, 1702, divers messuages had been erected on the said piece of ground . . . . The said pieces of ground, areas, cellars and forecourt passed to the respective Plaintiffs for the aforesaid interests therein, under the several conveyances to them of their said several houses, as parts of or as appurtenant to the same houses respectively.

The Defendant by his statement of defence did not admit that any of the Plaintiffs were entitled to any interest in the soil of the forecourt, submitted to the Court the question what passed to the respective Plaintiffs under the several conveyances to them, and did not claim any title to the forecourt himself, but alleged that it was public property, that in what he had done he had acted with the license of the Commissioners of Sewers for the City of *London*, and that he had done no damage or wrong to the Plaintiffs.

In August, 1882, the Defendant obtained under Order XXXI., rules 12, 13 and 14, the usual order for the Plaintiffs to make an affidavit of documents in their possession respectively relating to the matters in question and for production thereof; but he did not give any notice to produce for inspection under Order XXXI., rule 15, any of the documents to which the Plaintiffs had made reference in their pleadings.

In compliance with this order, the Plaintiffs made several affidavits, each in a similar form, in which they each objected to produce certain documents specified in the second part of the schedule to their affidavit upon the ground that "they relate exclusively to my title and that of some of my co-Plaintiffs, and do not prove or tend to prove that of the Defendant."

The Defendant then, on the 11th of January, 1884, took out a summons to consider the sufficiency of the Plaintiffs' objections to production, and asking that notwithstanding such objections they might be ordered to produce the documents for which protection was claimed by them.

Amongst the documents which the Plaintiffs objected to pro-

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duce were the deeds referred to in paragraphs 4 and 5 of the statement of claim.

The summons was heard before Mr. Justice *Kay* on the 13th of February, 1884.

Hastings, Q.C., and *Phipson Beale*, for the Defendant, in support of the summons:—

The Plaintiffs claim title to the soil of this forecourt, but admit that we may have a right of way over it; we on the other hand maintain that it is a public highway on which we, with the assent of a certain public authority, are entitled to do what we have done. The deeds they object to produce might shew by their parcels or otherwise what the exact boundaries are, or that the forecourts never passed at all, and so might be most material to our case. In fact from their nature they must tend to prove or disprove our case. A claim of privilege on the ground that the documents in question are title deeds of the Plaintiffs, and do not prove or tend to prove the Defendant's title, is not sufficient, for the Defendant does not set up any title in himself, and these documents may impeach or disprove the Plaintiffs' title, and may be very material to the Defendant's case. It is admitted that they relate to the subject matter of the suit, and the Plaintiffs cannot constitute themselves judges of what the effect of the deeds may be, as to which they may be wrong; nor can they claim to protect them because they hope the Court would think them immaterial to the Defendant: *Attorney-General* v. *Emerson* (1); *Kettlewell* v. *Barstow* (2); *Lyell* v. *Kennedy* (3).

Again, the Plaintiffs have referred to some of those documents in their pleadings, and that being the case it is not enough for them as Plaintiffs to say that the documents so referred to relate only to their own title. It is true that we have given no notice under rule 15, but the principle is the same: *Quilter* v. *Heatly* (4). While rule 14 gives the Court a discretion to order the production by any party of any documents relating to the matters in question, rule 15 suggests a difference in the relative positions of Plaintiff and Defendant, which seems to have been fore-

(1) 10 Q. B. D. 191.
(2) Law Rep. 7 Ch. 686.
(3) 8 App. Cas. 217.
(4) 23 Ch. D. 42.

shadowed by Lord *Selborne*, L.C., in *Minet* v. *Morgan* (1), giving to the defendant an advantage denied to the plaintiff, probably on the ground that the latter, being the attacking party, ought to disclose the grounds of his attack.

The form of this affidavit is, however, a fatal objection to it.

[KAY, J., referred to *Webster* v. *Whewall* (2).]

W. Pearson, Q.C., and *Stock*, for the Plaintiffs:—

Order XXXI. contains two groups of rules as to production of documents, viz., rules 12 to 14, which apply to the ordinary case of discovery of documents, and rules 15 *et seq.*, which apply to a case where notice has been given to produce documents referred to in the pleadings. No such notice has been given here, and rule 15 has nothing to do with the question in this case, which is, whether the Plaintiffs have properly claimed privilege under rules 12 to 14, which have not altered the former practice. *Quilter* v. *Heatly* (3) was a case under rule 15, or the rule analogous thereto, the object of which was to prevent a plaintiff from alleging a fictitious case; and the *bona fides* of our claim sufficiently appears. *Lyell* v. *Kennedy* (4) was only a decision that the ordinary rules as to discovery apply to an action of ejectment, and it has no bearing upon the present case. The privilege is here claimed according to the canon of *Wigram*, V.C., quoted by *Selborne*, L.C., in *Lyell* v. *Kennedy*, viz., that a party can withhold discovery of documents relating exclusively to his own case. The argument is, that though an affidavit of documents has been made claiming privilege in proper form, yet if the Court can see that the party has taken a mistaken view of the character of his documents it will make the order, but there is nothing whatever here to raise any presumption that these documents are not what the Plaintiffs say they are.

Hastings, in reply, referred to the judgment of Lord Justice *Lindley* in *Quilter* v. *Heatly* (5).

(1) Law Rep. 8 Ch. 361, 364.
(2) 15 Ch. D. 120.
(3) 23 Ch. D. 42.
(4) 8 App. Cas. 217.
(5) 23 Ch. D. 42, 50.

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KAY, J.:—

This case has led to rather an interesting discussion relating to the new rules as to the production of documents. [His Lordship then stated the facts of the case, and after observing that paragraph 5 of the statement of claim seemed to raise the question of parcel or no parcel, and the Defendant did not claim any title of his own to, or any interest in the forecourt in question, and after referring to the form of the affidavit of documents continued:—] That is scarcely a proper form of affidavit, for this reason, that the Defendant has not asserted any title whatever, and it is obvious that what the Plaintiffs mean to say is that the documents they object to produce do not prove or tend to prove the case of the Defendant, and if those had been the words of the affidavit, according to the ordinary rule of privilege that affidavit would have been sufficient under the circumstances of this case to entitle the Plaintiffs to the privilege so claimed, unless it appeared from the nature of the documents themselves that they must relate to the case of the Defendant.

The documents set out in the schedule which are sought to be protected are first of all an assignment dated the 19th of January, 1801, then a counterpart of the lease, then a certificate of payment of succession duty, then another assignment, and another assignment, and a lease, and counterpart, another assignment, and so on. They are in fact conveyances, or leases, or agreements for leases, or something of that kind—the usual title deeds which a man has in his muniment room. Now, it is argued, first of all, that looking at those documents the Court is to assume from the nature of the documents themselves that the statement in the affidavit cannot be true. I confess I am totally unable to make any such assumption. The argument seems to be this. The Plaintiffs may have misstated the effect of those documents, and if they have, then they will shew that this forecourt does not belong to them. That is a strange way of dealing with title deeds. Because a man says that his title deeds shew his own title, and do not relate to the title of the defendant, who does not set up a title, the Court is bound to allow production of them, because they may be wrongly stated, and they may in fact shew that which the deponent swears they do

not shew. I am not aware of any case in the books that would justify the Court on any ground of that kind in ordering production. Observe it is not even like a case of boundary. It is not an allegation that there is a boundary between the Plaintiffs' and the Defendant's land, which the Plaintiffs put in one place, but which the Defendant says is somewhere else, in which case the title deeds of the Plaintiffs might be very important evidence to shew where the boundary was. There is nothing of the kind in the case before me. It is not at all a case in which the Defendant suggests that he has got co-terminous property with the Plaintiffs; but he denies the Plaintiffs' title to this piece of land entirely. The Plaintiffs say, "Our title deeds shew that it is our land." That is not a case in which I can say from the description of those deeds that the affidavit is obviously wrong, and that the Defendant has a right to production, because the deeds must necessarily relate to the Defendant's case and shew something to support the Defendant's case. It does not seem to me that it is at all necessary that they should shew anything to support the Defendant's case, or tend to support it. I dispose therefore of that objection.

The more interesting question arises under the new rules. Undoubtedly in such a case as this before the Judicature Act it would not have been possible for the Defendant either by a cross bill under the old practice, or by the notice which he might have given under 15 & 16 Vict. c. 86, s. 20, or by the order which he might have procured under that section, to have obtained production of the title deeds of the Plaintiffs if they had properly protected them by their affidavit. Now, have the new Orders altered that?

First of all I observe that in one of the cases which has been referred to, viz., *Lyell* v. *Kennedy* (1), the present Lord Chancellor in the early part of his speech says this: "It was held," meaning that it was held by the Court of Appeal, from whose decision this was an appeal to the House of Lords), "I think correctly, that the right of discovery under the present rules of the Supreme Court is not in principle more extensive than it formerly was in the Court of Chancery; and the plaintiff's

(1) 8 App. Cas. 217, 223.

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counsel was challenged to produce authorities in support of the right of a plaintiff," and so on. Therefore, according to the general idea which the Lord Chancellor has of the effect of the new rules, he did not suppose them to have enlarged that right of discovery in any way. And for all practical purposes the present rules are the same as those which existed when the Lord Chancellor made that statement. The rules as to discovery and inspection are now under Order XXXI., and the former rules of that Order relate to interrogatories. Then comes rule 12, "Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application, the Court or Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order either generally or limited to certain classes of documents as may in their or his discretion be thought fit." I read that rule, because obviously that does not in any way touch the question of the right to privilege and to protect on one ground or another any of the relevant documents a party may possess. Rules 13 and 14 are in the same way rules that in no way touch the right to protection or privilege. Those are the only rules that apply to the ordinary application for production. But then there is rule 15, which applies to a different state of things altogether. It provides that "Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice." There the phrase is changed. It is not to make discovery, but it is to produce for inspection, and "to permit him or them to take copies thereof." What discovery can mean beyond that I do not know, and I do not exactly know why the phrase is changed, because this is essentially discovery. Then comes the consequence in the nature of a penal consequence to the person to whom that notice is given—all this being without interference by the Court in any way—

And any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a Judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or Judge shall deem sufficient for not complying with such notice." I instanced the case of a reference being made in the pleadings to a letter of advice from a solicitor for a plaintiff or a defendant to him, and I asked whether it could be maintained that because such letter had happened to be referred to in the pleadings or affidavits it must be produced as a matter of course, and very properly it was said, No, that would probably come within the words "some excuse," and would probably be held to be a proper excuse for not producing it.

But the curious thing in this Order, which I confess I am not at present fully able to understand, is this, that where the excuse is because the document is a document of title the order seems to say that such an excuse may be made by a defendant but not by a plaintiff. Why? In the nature of things I see no reason in the world for this. In one of the judgments referred to during the argument, *Quilter* v. *Heatly* (1), there is a statement by Mr. Justice *Chitty* that he had heard the late Master of the Rolls say that the reason was that the pleader in order to prevent a demurrer, sometimes set out a fictitious document. I must say that in all my practice I never met with such an instance. However, it may possibly be so. But why does that refer to the case of a plaintiff only? The stress of his case might induce a defendant to do the same kind of thing, to plead for example a fictitious release that had never existed at all. That is a matter more common. The Master of the Rolls is stated to have said in the passage which I have referred to, that before the *Judicature Act* there was not the same reason for supposing a defendant would do so because an answer would be put in on oath. But that is not so now, for since the *Judicature Act* an answer is not upon oath. Therefore when this rule was made a defendant was in the same position as a plaintiff,

(1) 23 Ch. D. 42, 45.

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and this reason for a difference between their rights did not apply. But literally the rule does provide that if a plaintiff sets up a document of title, or refers to a document of title on the face of his pleadings, he is bound to produce that upon notice under the penalty that if he does not it shall not be put in evidence by him at the hearing. Take such a case as I had to deal with this morning (1), where, according to the rules of pleading, the plaintiff is bound to deduce his title from the owner of a reversion to a lease, and to refer to the various documents, assignments, or what not, by which that title has become vested by assignment in him. It follows, if I am right in the construction of this rule, that being bound by the rules of pleading to refer to all such documents in his pleadings, although they are documents of his own title simply, he must upon this notice produce them for the inspection of the defendant and let him take copies of them under the penalty, if he does not do so, of not being allowed to prove them at the trial of the action, whereas upon a defendant no similar burden is cast. What makes it more extraordinary is this, that in the previous rules, those rules under this Order which precede this 15th rule, there is no alteration whatever, no allusion, and no attempt to alter the rules of privilege which existed when these orders were made. At present I must say that I do not thoroughly understand why that should be so, but a reason for it is suggested by a reference to what was said by the present Lord Chancellor in *Minet* v. *Morgan* (2), where he says (observe at the time judgment was delivered, in 1873, the *Judicature Act* had not passed), that although it was not the rule at that time there might be some reason for compelling a plaintiff who rests his case upon documents of title to make discovery of those documents when he is attacking a defendant, and it is suggested that these rules having been framed since that *dictum* of the Lord Chancellor are grounded upon that *dictum*. It may be so. I do not know I am sure how it came to be as it is.

Now I have to consider this—supposing this rule to have the effect which has been suggested in the argument, namely, that, not a defendant but a plaintiff, stating or referring to documents

(1) His Lordship was referring to *Davis* v. *James*, *post*, p. 778.
(2) Law Rep. 8 Ch. 364.

of title in his pleading, may be compelled, upon notice, to produce those documents for the inspection of the defendant, under the penalty of not being able to prove them if he does not,—ought or ought not the Court, when it is considering the question of privilege from discovery upon an affidavit of documents, to remember this rule, and that it provides a mode in which documents referred to in the pleadings, may be seen by a defendant, and, therefore, to reject a privilege as to those documents when discovery is sought in this way. All that I can say is, that the rules do not say so. I have not got to deal now with any application under rule 15; when I have, I will deal with it as best I can. At present I am dealing with an affidavit of discovery, by which, subject to a slight correction which I can give the parties liberty to make, because I think they intended to state a sufficient case for protection, it seems to me that they have made a case which would entitle them to protect these documents unless they have done away with the right of protection by referring to them in their pleadings. I will assume, as I have up to this moment, that all these documents are referred to specifically in the pleadings, and, therefore, that they would come within sect. 15.

I therefore decide this case on this footing simply, that the right to discovery is not, as the Lord Chancellor said in *Lyell* v. *Kennedy* (1), altered or intended to be altered by these new rules, that the right of discovery is not enlarged, and, therefore, the right to protection on any ground of privilege, remains where it was when the question is a question of discovery. If any party wishes to avail himself of the provisions of rule 15, that will be a different application from that which is now before me. I do not choose to mix the two things up, so as to say that rule 15 in the least degree alters the course of practice upon an application for discovery properly so called under the former part of this order. Therefore, it seems to me that I ought, in this case, to give the party leave to put in a better affidavit, and, subject to that, I can make no order upon this summons.

W. W. K.

C. A.

From this order the Defendant appealed. The appeal came on for hearing on the 9th of April, 1884.

(1) 8 App. Cas. 217.

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Hastings, Q.C., and *Phipson Beale*, for the Appellant, cited *Attorney-General* v. *Emerson* (1) and *Quilter* v. *Heatly* (2).

W. Pearson, Q.C., and *Stock*, for the Plaintiffs, were not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay*, who refused to order production by the Plaintiffs of certain deeds referred to in their statement of claim. Two points were urged by the Appellant. First, it was said that the Plaintiffs' affidavit claiming privilege cannot be relied on; and, secondly, that Order XXXI., rule 15, has taken away the protection from these documents.

With respect to the first point, the recent case of *Attorney-General* v. *Emerson* was cited as establishing the proposition that the Court may suppose that the Plaintiffs may have misunderstood the effect of the documents. As I understand that case, the Court held that there was protection unless the Court was satisfied that the effect of the documents was misconceived. In that case there were court rolls extending over many years, and the Court was able to see, from the nature of the questions in the action, and of the documents, that the effect of the documents was misunderstood. So far that case is an authority. But I think that we ought not to speculate in order to get rid of the protection claimed, and that we ought to accept the affidavit as conclusive unless the Court can see distinctly that the oath of the party cannot be relied on. So far as I can see there is nothing in this case to shew that; and to say in an ordinary case that the Court cannot rely on the affidavit of a party, would be practically to take away the right of a plaintiff or defendant to claim protection for any deed. I think in this case, therefore, we cannot disregard the Plaintiffs' affidavit.

It is then said that the Plaintiffs cannot avail themselves of a claim to protection, because they have referred to the deeds in their pleadings, and Order XXXI., rule 15, is relied on. But that rule only says that if a party will not produce a document to

(1) 10 Q. B. D. 191. (2) 23 Ch. D. 42.

which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. In my opinion, that rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced. The appeal, therefore, fails.

FRY, L.J. :—

I am of the same opinion. It has been argued that we must conclude that if these deeds were produced we should find the Plaintiffs in error in saying that the deeds relate only to their own title. For anything I know that may be true, but as there is nothing to lead us to any conclusion one way or the other, we are bound to believe the Plaintiffs' affidavit.

With respect to the second point, we are invited to say that Order XXXI., rule 15, has introduced a new practice, namely, that where a document is referred to in the pleadings, all privilege with regard to it is gone. The rule does not say any such thing. The circumstances in *Quilter* v. *Heatly* (1) are very different from the present. The appeal must be dismissed with costs.

Solicitors: *Norton, Rose, & Co.; Coode, Kingdon, & Cotton.*

(1) 23 Ch. D. 42.

M. W.

C. A.
1884
May 17, 19.

In re JONES.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7, 10, *cl.* (*i.*); *s.* 58, *sub-s.* (1), *cl.* (*ix.*)—*Limited Owner—Power of Sale—*"*Person entitled to the income of land.*"

Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of *A.*, with remainders to the use of *A.*'s children and issue. The trustees of the life estate were directed to enter into possession of and manage the property, pay outgoings, keep down the interest on incumbrances, and during *A.*'s life pay out of the residue an annuity of £400 to the person next entitled in remainder, and pay the ultimate residue to *A.* The estates were so heavily incumbered that after payment of outgoings and interest there was not enough to pay the annuity of £400. *A.* therefore had received nothing, and there was no prospect of his receiving anything for many years:—

Held (affirming the decision of *Bacon*, V.C. (1)), that *A.* was a person entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management, within the meaning of the *Settled Land Act*, 1882, sect. 58, sub-sect. (1), clause (ix.), and therefore possessed the power of selling given by the Act to tenants for life.

IN this case a testator devised his estates, which were heavily incumbered, to trustees for a term of 2000 years, upon trust to raise a sum of £30,000, which was to be held in trust for his wife for life, and upon trust to raise a further sum of £15,000 for the purposes therein mentioned, and subject thereto he devised the estates to the use of a second set of trustees during the life of his son-in-law, Colonel *Grey*, upon the trusts therein mentioned, and after the decease of Colonel *Grey* to the use of Colonel *Grey's* sons by the testator's daughter successively for life, with remainders in tail to their sons. The trustees of the life estate were to enter into possession of and manage the property, and receive the rents, keep down the interest on all incumbrances, pay £400 a year for the benefit of the son of Colonel *Grey's* deceased wife, who should for the time being be entitled to the first estate expectant on the death of Colonel *Grey*, and to pay the surplus of the rents to Colonel *Grey* for life. The trustees of the life

(1) 24 Ch. D. 583.

estate had a power of sale and exchange exercisable with the consent of Colonel *Grey* during his life.

The rents of the property, after payment of interest on incumbrances, were not sufficient to pay the £400 a year to the first tenant in remainder. There was, therefore, no income for Colonel *Grey*, nor was there any probability of any for many years to come. The question was whether under these circumstances Colonel *Grey* had the powers of a tenant for life under the *Settled Land Act*, 1882. Vice-Chancellor *Bacon* decided in the affirmative, see 24 Ch. D. 583, where the facts are more fully stated. The surviving trustee appealed, and the appeal was heard on the 17th and 19th of May, 1884.

Oliver A. Saunders, for the Appellant:—

The Act gives powers of sale to tenants for life, and to persons who are put by the Act in the position of tenants for life. Among these are persons "entitled to the income of land." A person cannot be entitled to the income of land if there is no income to receive, he cannot be entitled to that which does not exist. Here Colonel *Grey* has never received any income, and there is no probability of there being any for him to receive. He therefore does not come within the Act.

Marten, Q.C., and *Northmore Lawrence*, *contrà*:—

The scope of the Act is that, so far as possible, there should always be a person capable of exercising the powers given by the Act to a tenant for life. Sect. 2 deals with the simple case of ordinary tenants for life. Then sect. 58 places in the position of tenants for life for the purposes of the Act many persons who do not answer that description, the object manifestly being to confer the powers upon almost every person having a limited interest in possession. Sect. 2, sub-sect. 7, shews that incumbrances are to be left out of the case. One object of the Act was to enable incumbered estates to be sold so that something might be got out of them, and that enactment shews that actual receipt of income was not contemplated. The case may fairly be held to come within sect. 2, sub-sect. 5, inasmuch as by sect. 2,

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sub-sect. 10, clause i., "possession" includes receipt of income; but if not, it comes within sect. 58.

Saunders, in reply:—

[Cotton, L.J.;—In sect. 58, does not "entitled to the income of land" mean "entitled according to the limitations of the settlement," without regard to incumbrances?]

It was intended by the Act to give the powers to a person who had a substantial interest in the property. The limitations of the settlement are not the only thing to be looked to, as is shewn by giving the power to a tenant by the curtesy.

Baggallay, L.J.:—

I am of opinion that the conclusion at which the Vice-Chancellor has arrived is correct. It is no part of the duty of the Court to criticise an Act of Parliament; it is our duty to construe it, and then to apply it to the circumstances of the case brought under our consideration. The object of this Act clearly was to create powers of sale in many cases in which previously no power of sale existed, and to give additional powers in other cases where there were limited powers under existing settlements. The title of the Act is "An Act for facilitating Sales, Leases, and other Dispositions of Settled Land, and for promoting the Execution of Improvements thereon." In many cases we are able to collect the intentions of the Legislature from the terms of the preamble. There is here no preamble, so to find out the intention we must bear in mind what the state of the law was when the Act passed, and then consider the language of the enactments. Now it may well happen that an estate may be so heavily incumbered, that there is no surplus rent after the interest on the incumbrances is kept down, and in that case practically the person who is the tenant for life according to the terms of the settlement derives no benefit from the estate. That was especially the case at the time of the passing of this Act, when the ordinary rate of interest was 3½ per cent., or, under favourable conditions, 4 per cent., whereas the ordinary rent derived from agricultural ground barely exceeded 2½ per cent. Now I should draw the inference

from the terms of this Act of Parliament that one main object was to provide for the clearing of estates from incumbrances under such circumstances, for the 21st section of the Act provides that the proceeds of sale shall be applied in one or more of the modes therein mentioned, one of them being "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement." It was very common in settlements at that time to confer a power of sale upon the tenant for life with the consent of the trustees, or upon the trustees with the consent of the tenant for life. Thus the concurrence of the trustees and the tenant for life was required before the sale could be effected. Under these circumstances where tenants for life and trustees did not pull together sales could not be effected, and the opportunity of improving an estate might be lost for many years. In my own experience I remember the case of a nobleman who was tenant for life for more than seventy years, and during that period of time he had no power of dealing with any part of the property in the way of sale, unless by procuring an Act of Parliament for that purpose.

In the present case the testator appears to have had an estate incumbered to the extent of between £80,000 and £90,000, and producing an income of something between £4000 and £5000. He devises the property to trustees for a term of 2000 years for several purposes, and the trustees of that term were in the first place to invest £30,000, to the income of which his wife was to be entitled for her life, and a further sum of £15,000 was eventually to be raised. He gives the estate to trustees during the life of Colonel *Grey*, and after his decease devises the estate to the use of the sons of Colonel *Grey* by his deceased wife, who was the testator's daughter, successively. He directs the trustees of the life estate, after keeping down the interest on the several sums which for the time being should be charged on the property, to pay out of the residue of the rents and profits an annuity of £400 per annum to the son of his deceased daughter who should be entitled for the time being to the first estate in remainder expectant on the decease of Colonel *Grey*, and to pay the balance or ultimate residue of such rents and profits to Colonel *Grey* and

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his assigns during his life. Then a power of sale and exchange was given to the trustees, exercisable with the consent of Colonel *Grey*. As far as regards the powers contained in the settlement, Colonel *Grey* was recognised and put in the position in which, under ordinary circumstances, the tenant for life would have been placed. He was the person whose consent was necessary to the exercise of the power of sale during his lifetime. That was the position of the parties when the Act passed. Colonel *Grey* was entitled to the residue of the rents and profits, if there were any, during his lifetime, and his consent was necessary to any exercise of the power of sale. The property is so heavily charged that the income is insufficient to keep down the interest on the charges and to pay the annuities. There is therefore no surplus income for Colonel *Grey* to receive, nor is there likely to be any for years. The question is whether under those circumstances Colonel *Grey* is entitled to exercise the power of sale conferred by the Act upon tenants for life. The 3rd section of the Act provides that "a tenant for life" may sell the settled land or any part thereof. Then we have to see who is the tenant for life, and the 2nd section contains the definition. Sect. 2, sub-sect. 5, provides that "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." Then sub-sect. 10, clause i., says that the word "possession," includes receipt of income. Sub-sect. 7 declares that a person is equally tenant for life notwithstanding that under the settlement or otherwise the settled land is incumbered or charged in any manner or to any extent. Reading those three sub-sections together, the person who is for the time being under a settlement beneficially entitled to the receipt of income from the settled land during his life, is for the purposes of this Act to be deemed to be tenant for life of that land, notwithstanding the property has been charged or incumbered to any extent whatever. There appears to me to be very strong reason for contending that Colonel *Grey* comes exactly within the meaning of the 5th sub-section of the 2nd section, as explained by sub-sects. 7 and 10. But if there be any doubt on that point, let us turn to the 58th section, which deals

generally with the interests of limited owners. That section enacts that "each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." In sect. 2, sub-sect. 5, the expression used is "beneficially entitled to possession," and when "possession" is extended to receipt of income, according to sub-sect. 10, clause i., we find that a person entitled to receive the income is treated as a tenant for life. I think that the words "where the estate or interest of each of them is in possession," means that the right is immediate and not in reversion or expectancy. Then we must look through the various provisions of sect. 58, to ascertain whether Colonel *Grey*, supposing him not to come under the 2nd section of the Act, comes under any of these provisions. We find it provided by sub-sect. 1, clause ix., that a person is to have the powers of a tenant for life if he is "entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." It appears to me that Colonel *Grey* is entitled to the income of the land under the trust to pay the surplus rents to him. I entirely agree with the suggestion of Lord Justice *Cotton* in the course of the argument, that you must look at the terms of the settlement to see what the person is entitled to, and not to the accidental circumstance that the intention of the testator has been to some extent defeated by reason of the income which he intended the party to take not being actually realised in consequence of the state of the property. In that view of the case it appears to me impossible to say that Colonel *Grey* is not entitled to the income of the land under the trust or direction for payment of it to him during his own life, exactly following the very terms of the Act of Parliament.

I think, therefore, assuming even that Colonel *Grey* would not be entitled under the 2nd section (and I am disposed to think that he would) to exercise the power of sale, he is clearly entitled to exercise it under sect. 58 (1) (ix.), and that the conclusion at which the Vice-Chancellor arrived is correct.

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COTTON, L.J.:—

This case has been very ingeniously argued by Mr. *Saunders*, but I think that the decision of the Vice-Chancellor is right.

In my opinion, Colonel *Grey* comes within sect. 58 (1) (ix.). If that sub-section had not been there it would have been a serious question whether he would not have come within sect. 2, sub-sect. 5. I think that sect. 58 (1) (ix.) was introduced to meet the very case which exists here of trustees who are not simply trustees in whom the legal estate is vested (in which case the equitable tenant for life would be entitled to possession or to receipt of the rents from the tenants), but have powers of management which necessitate their remaining in possession, that is to say, managing the estates and receiving the rents from the tenants. The person entitled to income is not in the ordinary position of an equitable tenant for life, but is entitled to receive from the trustees who are in possession and are managing the estate, that which is called in the Act the "income" of the land. The interest of Colonel *Grey* is an interest in possession, the incumbrances created by the settlement not preventing its being so, but only subjecting that interest, which is in possession and not in remainder, to certain prior charges.

The argument which was urged upon us may shortly be put thus: in order to say that he is a person entitled to the income there must be income to which he is entitled. But in my opinion, looking at the whole purview of this Act, you must look to the settlement to see what the limitations are, and then, without regard to the greater or less productiveness of the estate, you are to see who, under the limitations of the settlement, answers the requisitions of the different clauses of the Act bearing on the question, Who is tenant for life? Considering that, I do not think it necessary (as at first I thought it was) that we should bring the case within sect. 2, sub-sect. 7, in order to say that Colonel *Grey* is entitled to exercise the powers of a tenant for life. But we can look at that sub-section, and also at other sections, for the purpose of seeing what the intention of the Act is. An incumbrance does not prevent a person being tenant for life within the meaning of the Act, and therefore the question is not what the person has actually received or enjoyed, but what,

under the settlement, he is entitled to, if there is any income to come to him. "Beneficially entitled," in sect. 2 does not mean "entitled and deriving a benefit from it," but entitled for his own benefit if there is anything to be derived from the estate, and not simply as trustee for others. Having regard to what I think is the intention expressed in the Act, in my opinion we must hold that, as the limitations of the settlement put Colonel *Grey* in the position of having an immediate right to receive the income of the land, if there is any, from the trustees, he comes within sect. 58 (1) (ix.). Sub-sect. (viii.) of the same section is a strong enactment. Mr. *Saunders* said it shewed that the limitations of the settlement are not the only things to be looked at. It is true that the person who gets the power under it is a person not contemplated by the limitations of the settlement, but he gets the possession by marrying somebody who is entitled under the limitations of the settlement.

My opinion here is that, as the limitations of the settlement put Colonel *Grey*, subject to incumbrances, in the position of being entitled to receive the income, if any, we are not to go into an account to see whether he gets anything, but must say that he is entitled under the Act to exercise the powers given to a tenant for life.

LINDLEY, L.J.:—

I also think that the decision of the Vice-Chancellor is correct. The paradox of Mr. *Saunders* is startling. He says, "How can a man be held to be entitled to the income of land when there is no income to be entitled to? Of course, if there is no income he cannot get it. But I think the answer to that paradox is this: You must see what is the meaning of the expression "entitled to income of land" in this Act. I am not at all sure that Colonel *Grey* could not be brought within sect. 2, but that is doubtful, and I prefer to rest the case, as the Vice-Chancellor rested it, on sect. 58. In order to bring Colonel *Grey* within that section we must first bring him within the first part of sub-sect. (1): "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act." The interest of Colonel *Grey* is this: he is entitled

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to the income, should there be any, subject to the trusts of a prior term of 2000 years. It at first struck me as doubtful whether a person in that position could be said to have any estate or interest in possession, the words "in possession," in sect. 58 being obviously used by way of distinction from "in remainder or reversion." But when we look further into the Act it seems obvious that a term of years, whatever its length be, when it is merely a security for charges, is not such an interest as prevents the person entitled to the income subject to that charge from being in possession within the meaning of sect. 58. It seems to me, therefore, that Colonel *Grey* comes within that part of the section.

Then does he come within the 9th sub-division of sub-sect. (1). Is he "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, &c." I agree with my learned Brothers that, in order to answer that question you must not look at the rent-roll or the charges, to do which would, I think, be entirely contrary to the whole scope of the Act of Parliament, but you must look at the settlement which gives him his title.

Looking at that, I think he comes strictly within the words of the Act, and it appears to me, therefore, that he has the power given by the Act to a tenant for life.

The costs of all parties were given out of the *corpus* of the estate, the Court saying that it was a case proper to be settled by the Appeal Court.

Solicitors: *Hunters, Gwatkin, & Haynes; Tamplin, Tayler & Joseph.*

H. C. J.

C. A.
1884
May 26.

In re MARTYN, A LUNATIC.
In re TOUTT'S WILL.

Lunatic Trustee—Order vesting Right to deal with the Trust Fund in the Trustees of Sound Mind.

Although, where one of the trustees of a trust fund becomes lunatic, the Court will not in general vest the right to deal with the trust funds in the trustees of sound mind, but will require a new trustee to be appointed in the place of the lunatic, an order vesting the right to the fund in the trustees of sound mind will be made where the fund is immediately divisible.

BY the will of *William Toutt* his residuary personal estate was given to trustees upon trust to pay the income of one moiety thereof to his wife for life, and after her death, in the events which had happened, to pay the income thereof to his daughter *Margaret Toutt* for life, and subject to the above life interests upon trust for such children of *Margaret Toutt* as being a son or sons attained twenty-one, or being a daughter or daughters attained that age or married. The testator died in 1827, *Margaret Toutt* married and died in 1864, having had a family of children, all of whom, except one who died an infant and unmarried, attained twenty-one. Part of the funds held on the trusts of the moiety were, with the consent of the widow, paid to children of *Margaret Toutt* on account of their shares, and there remained a sum of £2401 9*s.* 3*d.* *India* £4 per cent. stock standing in the names of the three present trustees of the will. *Charles Martyn*, one of these trustees, was found a lunatic in 1882. The testator's widow died in June, 1883. The two trustees other than the lunatic presented a petition asking that the right to call for a transfer of and to transfer the fund and to receive the dividends might vest in them.

Samuel Dickinson, for the Petitioners:—

It is submitted that the rule in *In re Aston* (1) will not be applied where the fund is immediately divisible. There are two

(1) 23 Ch. D. 217.

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trustees of sound mind, and no useful purpose can possibly be served by appointing a third when there is no continuing trust.

COTTON, L.J.:—

Where there is a continuing trust I have a strong objection to removing a trustee without appointing another in his place, but where the fund is immediately divisible I do not see any objection to letting the trustees who are of sound mind have the fund for the purpose of dividing it. In my opinion, therefore, the order asked ought to be made.

BAGGALLAY and LINDLEY, L.JJ., concurred.

Solicitors: *Brundrett, Randall, & Govett.*

H. C. J.

C. A. 1884 CHITTY, J. *May* 16. C. A. *May* 28.

HAMPDEN *v.* WALLIS.

[1884 H. 670.]

Practice—Attachment—Order for Production of Documents—Service on Solicitor—Indorsement on Order—Rules of Supreme Court, 1883, *Order* XXXI., *rr.* 21, 22, 23; *Order* XLI., *r.* 5; *Order* LII. *r.* 4.

Order XLI., rule 5, which requires any order to bear an indorsement warning the party bound by it of the consequences of disobedience, applies to an order for discovery of documents of which service on the solicitor is permitted. And a writ of attachment cannot be issued against a person who disobeys such an order unless the copy served on his solicitor bore the required indorsement.

A party whose solicitor was served with such an order without the required indorsement took out a summons for further time:—

Held (*dissentiente Lindley*, L.J.), that he did not thereby waive the irregularity of the service.

The decision of *Chitty*, J., reversed.

The affidavit in support of a motion for attachment was not served with the notice of motion as it ought to have been under Order LII. rule 4, but was served two clear days before the day named in the notice of motion for moving the Court:—

Held, by *Chitty*, J., that this was not such an irregularity as made the notice invalid.

AN order was made in this action on the 22nd of March, 1884, whereby the Defendant, *E. W. Wallis*, was ordered to file within

seven days after service an affidavit of documents in his possession. This order was served on the Defendant's solicitor on the 23rd of March. The copy of the order served did not have indorsed upon it the notice required by Order XLI., rule 5, warning the person required to obey the same that he would be liable to process of execution if he failed to obey it.

On the 7th of April the Defendant took out a summons for further time to file his affidavit, but the application was refused.

The Defendant having failed to comply with the order, the Plaintiff gave notice of motion to issue a writ of attachment against the Defendant, and the motion came on to be heard before Mr. Justice *Chitty* on the 16th of May.

The Defendant resisted the issue of the writ on the grounds, first, that the copy of the order of the 22nd of March, which was served on him, did not bear the requisite indorsement; and, secondly, that the copy affidavit filed in support of the motion to attach the Defendant for disobedience was not served with the notice of motion although it was served two clear days before the day named in the notice of motion for moving the Court.

Whitehorne, Q.C., and *Tremlett*, for the Applicant, cited *Land Credit Company of Ireland* v. *Lord Fermoy* (1); *Thomas* v. *Palin* (2); *Joy* v. *Hadley* (3); and referred to Order XXXI., rules 21, 22, 23; Order XLI., rule 5.

Oswald, for the Respondent, referred to *Litchfield* v. *Jones* (4); Order LII., rule 4.

Whitehorne, in reply.

CHITTY, J.:—

The first point which I have to decide in this motion is whether the provision in Order XLI., rule 5, applies to an order for discovery such as has been made in the present case. That rule provides that "every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order,

(1) Law Rep. 5 Ch. 323.
(2) 21 Ch. D. 360.
(3) 22 Ch. D. 571.
(4) 25 Ch. D. 64.

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within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz.—

If you, the within named *A. B.*, neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order]."

It is to be observed that process of execution includes attachment. The point in this case turns upon the proper method of construing rule 5, which for that purpose must be read in conjunction with Order XXXI., rules 21, 22, 23, which contain the following provisions:—"If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly." "Service of an order for interrogatories, or discovery, or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may shew in answer to the application that he has had no notice or knowledge of the order." "A solicitor, upon whom an order against any party for interrogatories, or discovery, or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment."

Putting these four rules together, it appears to me that rule 5 of Order XLI. applies only to those orders which require to be personally served. Rule 22 of Order XXXI. lays down in express terms that it is sufficient to serve the order on a solicitor in order to found an application for attachment for contempt. A distinction appears to be drawn intentionally. The framers of

the rules apparently were of opinion that where the service was personal, that is to say, on the party himself, it was necessary to give him due notice of what the consequences of disobedience to the order would be, but where service on the solicitor is sufficient the framers of the rules thought that the solicitor ought, in pursuance of his duty, to inform his client of the consequences of non-compliance, and, accordingly, no memorandum was in that case necessary. That is shewn by the express provisions of rules 22 and 23 of Order XXXI. The solicitor is liable to attachment if he neglects to give notice to his client. If the framers of the rules thought that rule 5 should apply to a case like this, by parity of reasoning they ought to have made it necessary to put the memorandum on the form served on the solicitor. The framers of the rules, however, did not think it necessary to have the memorandum put on the notice served on the solicitor, as they thought he must be taken from his professional position to be fully aware of the penalties of disobedience.

I consider, therefore, that the provisions of rule 5 of Order XLI. do not apply to this particular case, and consequently the objection taken by counsel for the Defendant cannot be sustained. The other point taken is this. By rule 4 of Order LII., it is provided that every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion. What was done in this case was this: Notice of motion was served for the motion to be brought on, on Friday, May the 9th. No copy of any affidavit was then served with the notice of motion, but on the 6th of May, more than two clear days before the day named for moving the Court, affidavits were filed and copies supplied. In strictness that is not an exact compliance with the provisions of the last-mentioned rule, but it is a mere irregularity, and of a trifling character, because copies were served and the party had due notice in time before the motion could come on. It is an irregularity which it is within the discretion of the Court to deal with under Order LXX., rule 1, which provides that non-compliance with any of the Rules

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of the Supreme Court, 1883, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or Judge shall so direct, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the Court or Judge shall think fit. It appears to me that this irregularity is one that must not be allowed to render the proceedings void: it has not put the Respondent in a worse position than he would have been in had the affidavits been served in exact compliance with the terms of rule 4 of Order LII. I therefore disregard the objection altogether, and decide against the Respondent on both points. The order will be in the terms of the notice of motion, and the Respondent must pay the costs.

G. M.

C. A.

The Defendant appealed from this decision. The appeal was heard on the 28th of May, 1884.

Oswald, for the Appellant:—

By Order XXXI., r. 22, the service of an order for discovery of documents may be made on the solicitor of the party bound by it, and such service is made sufficient for a motion for attachment. Then Order XLI., rule 5, makes it necessary for any order to have a notice indorsed on it of the consequence of disobedience. This order is perfectly general and applies to all orders. There is no distinction made between orders personally served and orders served on the solicitor.

Whitehorne, Q.C., and *Tremlett*, for the Plaintiff:—

The rule under which indorsement is required is based upon the Consolidated Order XXIII., rule 10, which directed a similar notice to be indorsed on every decree or order. That rule was held only to apply to process of contempt: *Land Credit Company of Ireland* v. *Lord Fermoy* (1). That process always involved personal service. There is not the same need for such an indorsement where the service is on the solicitor, for he is bound by Order XXXI., rule 23, to inform his client of the service, and

(1) Law Rep. 5 Ch. 323.

he would at the same time inform him of the consequence of disobeying the order. Moreover, the party bound by the order is now protected by Order XLIV., rule 2, which prevents a writ for attachment being issued without notice: *Thomas* v. *Palin* (1).

But if there was any irregularity it has been waived by the Defendant, who took out a summons for further time, thereby admitting that he had been duly served with the order, and knew that the time limited by it had expired.

Oswald, in reply:—

The summons was not a waiver of the absence of the indorsement. The omission was not an irregularity which could be waived; it was a matter of substance. In issuing an attachment, being a case in which the liberty of the subject is concerned, the person taking it out is bound to shew that everything is *rite actum*. He cannot rest upon waiver.

BAGGALLAY, L.J.:—

This is an appeal from an order for attachment issued against the Defendant for not obeying an order of the 22nd of March, 1884, directing him to file an affidavit of documents. The order was served soon after on the Defendant's solicitor, and the Defendant being in default, the order for attachment was made on the 16th of May. The objection raised against the order is that there was no indorsement on it as directed by Order XLI., rule 5, warning the person required to obey it of the consequence of disobeying it. Order XXXI., rule 21, says, "that if any party fails to comply with any order to answer interrogatories or for discovery, or inspection of documents, he shall be liable to attachment." And rule 22 of the same Order goes on to provide that service of any order for interrogatories, or discovery, or inspection, made against a party on his solicitor, shall be sufficient service to found an application for an attachment for disobedience to the order. The order in the present case was served on the solicitor, but it is said that the service was not sufficient, because the copy served did not bear the indorsement required by Order XLI.,

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rule 5. Mr. Justice *Chitty* held that this order did not apply to the present case, because the service was not personal service on the Defendant.

With every respect for the learned Judge's opinion, I cannot take the same view of the construction of the rule. The order relates to all judgments, and rule 5 is perfectly general in its tone; there is nothing in it limiting it to any particular kind of orders. It is suggested that it was intended to be confined to process of contempt. I can see no ground for confining it in that way. Then the question is whether it applies only to cases where the order is served on the person required to obey it. When we look at Order XXXI., rule 22, we find that service on the solicitor shall be sufficient service — that must mean sufficient for all purposes—in order to found an application for an attachment. If the service is on the solicitor it is the duty of the solicitor to communicate it to the party, and he is himself liable to an attachment if he fails to do so. Therefore, this being a sufficient service to support an attachment, it appears to me clear that the provisions of Order XLI., rule 5, apply. On this point, therefore, I am unable to come to the same conclusion as Mr. Justice *Chitty*. I think the proceedings for attachment have failed by reason of the want of the proper indorsement.

It was then urged that there had been a waiver by the Defendant of the irregularity. After the time limited by the order for discovery had elapsed, the Defendant took out a summons for further time, and it is contended that this was a waiver of the objection to the service. The order served on the Defendant's solicitor gave him every information as to what was required and the time within which it was to be done, although it did not state the consequences of his disobedience. It may be that the act of the Defendant in taking out the summons was a waiver of want of notice of what he was required to do and of the time within which it was to be done; but I do not think it was sufficient to amount to a waiver of the failure to indorse the required memorandum.

The appeal must succeed, but we do not think it right to give any costs of the appeal.

COTTON, L.J.:—

There are two questions raised in the present appeal, one only of which was decided by Mr. Justice *Chitty*. The main question is whether the requirements of Order XLI., rule 5, apply to this case. Now service on the solicitor of a party is made by Order XXXI., rule 22, sufficient to found an attachment against the party, in the case of an order for discovery of documents. That is an exception from the general rule requiring personal service. But it is said that rule 5 of Order XLI. only applies in cases where personal service is required. I do not propose to enter into the argument as to the reasons for requiring the indorsement of the memorandum. The only question is, what do the Rules say? Service on the solicitor is under Order XXXI., rule 22, equivalent to service on the person. Order XLI., rule 5, is not in my opinion confined to cases in which personal service of the order is required, but extends to cases where service may be effected on the solicitor. The service in this case was therefore irregular.

The next question we have to consider, is whether the right to object has been waived. In my opinion service of a summons for further time is not sufficient to shew that the person served has waived the right to object that the order is not indorsed in accordance with the Rules. I think that the decision of Mr. Justice *Chitty* was erroneous and that the appeal must be allowed.

LINDLEY, L.J.:—

I think that on the first point the learned Judge has made a mistake. The 5th rule of Order XLI. is a new rule which is applicable to every Division of the High Court, and to every cause or matter therein. The language of the rule is quite general. But it is said that as it speaks of the order being "served on the person required to obey the same," it only applies when the service is personal and not where the service has been properly effected, as in this case, on the solicitor. Rule 22 of Order XXXI. provides that service of certain orders, of which this is one, shall be sufficient if made on the solicitor. The effect of that rule is that such service is equivalent to personal

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service, and therefore on this point I agree with the other members of the Court.

On the question of waiver I do not take the same view as the other Lords Justices. I do not think it possible to ignore not only the fact that a summons has been applied for by the Defendant, but what was asked for by the summons. The summons asked for further time for the Defendant to file his affidavit, that is further time reckoning from the day when the original order was served on him, so that the person who took out the summons admitted due service of the original order. I think the absence of an indorsement did not make the order such a nullity as to prevent his being bound by such an admission.

The result, however, of the opinion of the majority of the Court is that the appeal succeeds; but we think that there should be no costs of the appeal.

Solicitors for Appellant: *Eardley-Holt & Richardson.*
Solicitors for Respondent: *Eldred & Bignold.*

M. W.

PHELPS, STOKES & CO. *v.* COMBER.

V.-C. B.
1884
May 12.

[1880 P. 965.]

Bill of Exchange—Specific Appropriation—Marginal Advice—Property in Goods—Right to disposal of Proceeds—Principal and Agent.

J. carried on business as a merchant at *Liverpool* under the firm of "*S. J. & Co.*," and also at *Pernambuco* in partnership with the Defendant *C.* under the firm of "*J., P. & Co.*" Both firms employed *B.* as their agent in *New York*. The firm at *Pernambuco* were in the habit of receiving orders from persons there for the purchase of goods in *New York*. Upon receipt of these orders that firm instructed the *Liverpool* firm, who instructed *B.* *B.* then purchased the goods and shipped them to the *Pernambuco* firm, at the same time sending the bills of lading to that firm. To enable him to pay for the goods *B.* drew bills of exchange on the *Liverpool* firm and sold them in *New York*. The bills were not drawn for the precise amount of the shipments, but for round sums which were brought into the account current between *B.* and the *Liverpool* firm. *B.* advised the *Liverpool* firm of the bills, and with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft" and containing a memorandum of the date and amount of the bill and the name of the drawer, with the words "Against shipments per" (naming the vessel). "Please protect the draft as advised above." The *Liverpool* firm, on the bills being presented to them for acceptance, detached the counterfoils and retained them in their own possession.

The Plaintiffs were the holders for value of three bills drawn by *B.* on the *Liverpool* firm in accordance with the above course of dealing, the goods purchased with the proceeds of the bills being shipped by *B.* to the *Pernambuco* firm, and the bills of lading being also sent to that firm.

On the 10th of June, 1879, the *Liverpool* firm stopped payment, and on the following day the goods arrived at *Pernambuco*, and were, with the bills of lading, delivered to the persons who had ordered them, the purchase-money being received by the *Pernambuco* firm.

The three bills of exchange being dishonoured by the *Liverpool* firm, the Plaintiffs brought an action against the *Pernambuco* firm claiming to have the bills paid out of the proceeds of the goods, on the ground that the latter had been specifically appropriated to meet the bills, but the Defendants claimed to retain the proceeds against a debt due to them from the *Liverpool* firm:—

Held, that there had been no such specific appropriation, and action dismissed, but without costs.

Ex parte Banner (1) considered.

ON the 11th of December, 1877, the following agreement was entered into between *Carruthers Charles Johnston*, of *Liverpool*, merchant, of the one part, and *Robert Bell Borland*, of *New York*, of the other part:—

(1) 2 Ch. D. 278.

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"Whereas the said *Carruthers Charles Johnston* is desirous of appointing the said *Robert Bell Borland* as agent to represent the partnership firms of *Samuel Johnston & Co.*, of *Liverpool*, *Johnston, Pater & Co.*, of *Pernambuco*, and *Johnston, Comber & Co.*, of *Bahia*, on commission in the *United States of America* for the term of five years from the 1st day of January, 1878, upon the terms and conditions hereinafter contained.

"Now it is hereby agreed between the said parties hereto as follows:—

"That the said *Robert Bell Borland* shall, for and during the period of five years from the said 1st day of January, 1878, enter into the service of the said *Carruthers Charles Johnston*, and well and faithfully act for him as agent on commission as may from time to time be required by him, the said *Carruthers Charles Johnston*, in the *United States of America*, and shall and will during the said term diligently attend the business concerns of the said *Carruthers Charles Johnston*, and the said firms of *Samuel Johnston & Co.*, *Liverpool*, *Johnston, Pater & Co.*, *Pernambuco*, and *Johnston, Comber & Co.*, *Bahia*.

"That all business transactions by the said *Robert Bell Borland* on behalf of the said firms shall be charged by commission . . . .

"That the said *Robert Bell Borland* shall be at liberty to make advances on shipments of produce consigned to the said *Carruthers Charles Johnston*, to the extent of not exceeding three-fourths of the net value thereof, and he is hereby authorized and empowered to draw on the said *Samuel Johnston & Co.* for the amount of all such advances, and also for the amount of any orders given by the said firms of *Samuel Johnston & Co.*, *Johnston, Pater & Co.*, or *Johnston, Comber & Co.*

"That the said *Robert Bell Borland* shall use his best endeavours and utmost exertions in obtaining consignments of, and orders for, produce in connection with the said firms."

At the date of this agreement *Carruthers Charles Johnston* was the sole representative of the firm of *Samuel Johnston & Co.*, merchants, of *Liverpool*. He was also the larger partner in each of the firms of *Johnston, Pater & Co.*, of *Pernambuco*, and *Johnston, Comber & Co.*, of *Bahia*, of which two latter firms the Defendant *Thomas Comber*, a merchant now resident in *England*, was a member.

From the date of the agreement to May, 1879, *Borland* acted as the general agent in *New York* of the three firms.

The ordinary course of dealing between the three firms and *Borland* was stated by the Defendant to be as follows: The *South American* firms were in the habit of receiving orders from persons in *Brazil* for the purchase of goods in *New York*, and those firms, upon receipt of such orders, instructed the *Liverpool* firm to purchase the goods and have them shipped to the former firms. Thereupon the *Liverpool* firm gave instructions to that effect to *Borland*, as their agent, who then purchased the goods in *New York* and shipped them to the *South American* firms, at the same time sending them invoices and bills of lading of such shipments. To pay for these goods *Borland* drew bills on the *Liverpool* firm, and sold the bills in *New York*. The bills were not drawn for the precise amount of the shipments but for round sums, which were brought into the account current kept between *Borland* and the *Liverpool* firm. *Borland* duly advised the bills so drawn by him to the *Liverpool* firm, and with such advice forwarded to that firm a statement of the account current between himself and them. There was this peculiarity in the case, that every bill drawn by *Borland* had annexed to it by means of a line of perforation a counterfoil or marginal advice, the whole document being in a form of which the following is an example :—

ADVICE OF DRAFT.

To Messrs. Saml. Johnston & Co.
Liverpool.

No. of Draft 401

Date May 9th, 1879.

Amount £1500 %

Against Shipts. per S.S. Glensannox, No. 6, N. Y. to Brazil *viâ* Balt.

Please protect the drafts as advised above and oblige.

Drawer

New York May 9th, 1879.

Exchange for £1500 %

New York, May 9th, 1879.

Sixty days after sight of this First of Exchange (second and third of same tenor and date being unpaid) pay to my order the sum of

Fifteen hundred pounds Sterling.

Value received and charge to account as advised.

(Signed) R. B. BORLAND.

To Messrs. Samuel Johnston & Co.,
Liverpool.

No. 401.

PAYABLE IN LONDON.

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When bills thus framed and drawn were presented for acceptance, the *Liverpool* firm invariably detached the counterfoils and retained them in their own possession.

On the 10th of June, 1879, the Plaintiffs, *Phelps, Stokes, & Co.*, bankers, of *New York*, were the holders for full value as purchasers, of three bills, drawn by *Borland*, as above, one numbered 401, dated the 9th of May, 1879, for £1,500, payable on the 23rd of July, 1879, and the other two numbered 402 and 404, dated the 16th of May, 1879, for £1,500 and £2,000, payable on the 30th of July, 1879. Each was, *mutatis mutandis*, in the form given above, and the counterfoil of each had the words "against shipments per s.s. *Glensannox*."

These three bills were drawn by *Borland*, to enable him to pay for certain goods bought by him on the instructions of the *Liverpool* firm, and in accordance with the course of dealing above stated, and shipped by him to the *Pernambuco* firm by the steamship *Glensannox*, on account of certain persons who had ordered the same from that firm. The invoices and bills of lading of the goods were at the same time sent by *Borland* to the *Pernambuco* firm.

On the above date, the 10th of June, 1879, the *Liverpool* firm stopped payment, and thereupon, on the evening of the same day, *Borland* telegraphed to the *Pernambuco* firm as follows: "Having pledged documents and shipments, *Glensannox*, hold proceeds subject order *Phelps, Stokes & Co.*, and *Bank British North America*."

The *Glensannox* arrived at *Pernambuco* on the following day, the 11th of June, and the goods were duly delivered to the customers for whom they had been ordered, the purchase-money being received by the *Pernambuco* firm. The bills of lading had been sent away to the customers before the receipt by the firm of the telegram of the 10th of June. The three bills of exchange having been dishonoured by the *Liverpool* firm the Plaintiffs called upon the Defendant and his *Pernambuco* firm to pay the amount of them, or to account for the goods, or the proceeds of sale thereof, but the Defendant and his *Pernambuco* firm claimed to retain the proceeds of the goods against a debt due to them from the *Liverpool* firm. The Plaintiffs then brought this action claiming payment of the three bills and interest, or failing this,

for an account of the goods shipped by the *Glensannox*, and of the proceeds of sale thereof, and payment of the amount of the three bills and interest to the extent of the value or the amount of the proceeds of the goods; and a receiver. The Plaintiffs in their statement of claim alleged that, when they purchased the three bills from *Borland* shortly before the 10th of June, 1879, he informed them that the bills were drawn against the shipments by the *Glensannox*, and that the proceeds of the goods were charged with the payment of the bills; also that as the agent of the *South American* firms and of the *Liverpool* firm he had authority to draw the bills and charge the proceeds of the shipments by the *Glensannox* with the payment. The Plaintiffs, moreover, contended that the effect of the notes on the counterfoils of the bills was to charge the shipments as security for payment of the bills.

The Defendant, however, in his statement of defence alleged that the practice of attaching counterfoils to the bills drawn by *Borland* had been adopted solely for the purpose of giving information to the *Liverpool* firm, and no one else, of the particulars stated in the counterfoils, and in order that the bills should not be presented for acceptance without the *Liverpool* firm being at the same time informed of the shipments made by their agent. He denied that *Borland* ever informed the *Pernambuco* firm "of the particulars" of the bills in question; nor did either of the firms "ever receive or have any information or knowledge of the said bills, or any of them, or of any of the particulars of the said bills." He also denied that the bills were drawn against the shipments by the *Glensannox*, or that the proceeds of the goods shipped were charged with payment of the bills, or that *Borland* was the agent of the *South American* firms or had the authority of those firms or of the *Liverpool* firm, to draw the bills or charge the proceeds of the shipments with their payment.

Carruthers Charles Johnston, the party to the agreement of the 11th of December 1877, in examination, deposed that he never authorized *Borland* to give any charge on or pledge any of the goods ordered by him, or the proceeds of any such goods. The practice of affixing counterfoils to the bills the witness himself suggested, in order that the bills might not be left unprotected.

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In cross-examination, witness said that at the date of the transactions in question he was substantially the sole partner in the *Liverpool* firm, and was the largest partner in the *Pernambuco* firm. The goods shipped by the *Glensannox* were purchased with the proceeds of the bills in question, and were received by the *Pernambuco* firm; who claimed to hold the proceeds of the goods against the indebtedness to them of the *Liverpool* firm. It was only a few days before the stoppage of the *Liverpool* firm that, owing to a very serious fall in the value of produce, witness was obliged to suspend payment. Up to the end of May, 1879, he considered himself perfectly solvent. The liabilities of the *Liverpool* firm were about £150,000, and witness had paid a composition of 9*s.* 6*d.* in the £1. Whenever *Borland* drew bills on the *Liverpool* firm for the purpose of procuring goods for shipment to *South America*, he always sent separate letters of advice, together with an account, and witness could not remember any occasion on which *Borland* failed to send such an advice.

One *Brown*, of *New York*, whose evidence was taken there, deposed that he sold the bills for *Borland* to one *Slater* on behalf of the Plaintiffs, but denied ever having represented either to *Slater* or to the Plaintiffs that the goods mentioned in the counterfoils of the bills were pledged or hypothecated to the Plaintiffs for the amount of the drafts.

Slater, who was also examined in *New York*, deposed that he understood from *Brown*, in conversation, that the bills were drawn against shipments of goods, and that he, *Slater*, read the marginal advices or bills as purporting to charge the goods there mentioned with the payment of the drafts.

Borland, however—also examined in *New York*—denied positively ever having stated to *Brown* that the goods were pledged for payment of the drafts, or that in point of fact the goods were so pledged. He also deposed that he sent the telegram of the 10th of June, 1879, at the instance of and under pressure from the Plaintiffs, after the news of the failure of the *Liverpool* firm had arrived, and that it was incorrect in stating that the shipments per the *Glensannox* were pledged.

R. T. Reid, Q.C., and *Northmore Lawrence*, for the Plaintiffs:—

The questions are, whether the form of the agreement em-

powered *Borland* to make an equitable assignment of the proceeds of a particular shipment to meet particular bills; and whether, having this power, *Borland* did effectually charge the proceeds of the goods shipped by the *Glensannox*, with the payment of the bills purchased by the Plaintiffs.

We rest our contention that *Borland* had this power, on the clause of the agreement which provides that *Borland* should be at liberty to make advances on shipments of produce consigned to *Johnston*, to the extent of three-fourths of the net value, and that *Borland* might draw for the amount of such advances; and we say, moreover, that the counterfoils notifying to the *Liverpool* firm the goods against which the bills were drawn amounted to an hypothecation of the goods, or a direction that they should be specifically appropriated to answer the bills.

Frith v. *Forbes* (1) shews that the general lien of a consignee cannot be set up against positive directions given by the consignor to appropriate the goods to a particular purpose.

Marten, Q.C., and *Frederic Thompson*, for the Defendant:—

The case of *Frith* v. *Forbes* turned on special circumstances; and was distinguished in *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (2), and in *Ex parte Arbuthnot* (3).

Ex parte Banner (4), on the other hand, is a direct authority in our favour. The counterfoils annexed to the bills in this case were, and were intended to be, only an announcement to the *Liverpool* firm that such and such consignments were on their way when the bills were drawn. *Thomson* v. *Simpson* (5) also greatly resembles this case. There the vendor of the bills made a statement to the purchaser, which was held only to be a correct description of the course of business between himself and the acceptor, and did not give the purchaser any lien on the funds of the drawee who had refused to accept the particular bills in question. This decision was affirmed in the House of Lords, *sub nom. Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (6). The terms of the agreement gave *Borland* no authority to

(1) 4 D. F. & J. 409.
(2) Law Rep. 7 Ch. 695.
(3) 3 Ch. D. 477.
(4) 2 Ch. D. 278.
(5) Law Rep. 5 Ch. 659.
(6) Ibid. 6 H. L. 352.

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appropriate goods. He was nothing more than a general consignor, and he received no special instructions to pledge this particular shipment. The circumstances here were materially different from those in *Frith* v. *Forbes* (1). Here the goods against which the bills were drawn went to *South America*, whereas the bills were sent to *Liverpool*. The proceeds of the shipment never reached *Liverpool* at all. That of itself is *primâ facie* evidence against the Plaintiffs' claim. If the goods had gone to *Liverpool*, the presumption would have been the other way, namely, that the goods were sent to meet the bills.

Nothing turns upon the conversation between the seller of the bills and the buyer, or upon the telegram sent by *Borland*. The case is clearly governed by the above-mentioned case in the House of Lords, which decided that a representation made by the drawer of bills to the seller does not amount to an equitable assignment.

Reid, in reply, cited *Ranken* v. *Alfaro* (2), and *Shepherd* v. *Harrison* (3).

BACON, V.C.:—

The course of mercantile business with regard to specific appropriation is well known, and in the present case we must rely on the facts before us, the law upon the subject being plain.

Johnston was a merchant at *Liverpool*, carrying on business under the name of *Samuel Johnston & Co.*; he also carried on business as a merchant at *Pernambuco*, under another firm in which the Defendant *Comber* had a small interest. Both firms employed *Borland* as their agent in *New York*. The firm at *Pernambuco* writes to the firm at *Liverpool* desiring a purchase to be made in the *United States*, and the *Liverpool* firm send the necessary instructions to *Borland*. *Borland*, without any funds or credit that I am aware of, has to pay for the goods purchased and ship the goods to *Pernambuco*. Acting within the scope of his authority, he draws bills on the *Liverpool* house, and to each of these bills is attached a counterfoil stating the particulars of the draft, and that it is drawn "against shipments per s.s. *Glensannox*."

(1) 4 D. F. & J. 409. (2) 5 Ch. D. 786.
(3) Law Rep. 5 H. L. 116.

His right being to charge the *Liverpool* firm with a commission, he draws the bills and sends them to that firm for acceptance. In the meantime he sells the bills to the Plaintiffs in *New York*, and he transmits the bills of lading of the goods to the firm at *Pernambuco*. It was impossible that the bills of lading could go to *Liverpool*, for they had to accompany the goods to *Pernambuco* and there was no hypothecation of the goods to the Plaintiffs or any one else.

It is said that the Plaintiffs had a charge on the proceeds of the goods, but there was no intention on the part of either firm or their agent to create a charge in favour of the Plaintiffs. By his advices on the counterfoils to the bills, *Borland* merely meant to say to the *Liverpool* firm, the drawees of the bills, "you may properly accept the bills of exchange because I have shipped the goods." It appears to me that the Plaintiffs must have relied on the solvency of the *Liverpool* firm, and that the counterfoils only meant that the shipments had been made. When the bills were presented for acceptance *Samuel Johnston & Co.*, as the drawees of the bills, kept the counterfoils. The firm at *Pernambuco* did not receive any notice of that transaction. They only knew that the goods had been purchased, for they received the goods and the bills of lading, which were indorsed in favour of the purchasers, who, it appeared, paid their money to the firm at *Pernambuco*, and not to the *Liverpool* firm.

What took place on the 10th of June, 1879, the date of the failure of the *Liverpool* firm, in my opinion does not advance the case at all. The Plaintiffs contend that it was only fair that the *Pernambuco* firm should apply the proceeds of the goods in discharge of the bills, but there was no contract whatever that they should do so. I find nothing in the shape of an appropriation for payment of the bills out of the proceeds of the goods. It appears to me that the case is entirely covered by the decision of the Court of Appeal in *Ex parte Banner* (1). In that case a foreign firm of *Christiansen & Co.* purchased goods for and consigned them to an English firm of *Tappenbeck & Co.*, the goods being purchased with the proceeds of bills drawn by the foreign firm on the English firm, and the bills of lading being sent direct

(1) 2 Ch. D. 278.

V.-C. B. 1884 PHELPS, STOKES & CO. v. COMBER.

to the English firm. Both firms having become bankrupt, the question was whether creditors of the foreign firm being unpaid holders of the bills with the proceeds of which the goods had been purchased, had a charge upon the goods in the hands of the English firm and had a right to have the proceeds of those goods applied to the payment of the bills. The Court of Appeal held that the foreign firm had parted with all property in the goods, and that there was no equity in favour of the holders of the bills to have the proceeds applied in payment of them.

Lord Justice *Mellish*, in delivering the judgment of the Court, said (1), "It was contended for the Respondents (the creditors of the foreign firm) that every person who consigns goods to another has a right to give directions how the goods are to be disposed of, and that a consignee to whom such directions are given must dispose of the goods in the way directed or else return them. We admit that this is true as a general rule." But in the present case the *Pernambuco* firm had no directions given them either by *Borland* or by the *Liverpool* firm as to the disposal of the goods shipped to *Pernambuco*. The Lord Justice then proceeds (2), "Where, however, a consignor sells goods to a consignee and directs him to carry the invoice price of the goods, that is, the debt due from the consignee to the consignor for the price of the goods, to a particular account, that does not involve a direction to deal with the goods themselves or the proceeds of the goods in any particular way." That is a very much stronger case than this, where there has been no direction to carry to a particular account, for *Borland* had no right to make any charge in favour of any person, his only right being to charge for his own commission. Then the Lord Justice says, "If the invoice price of the goods is placed on one side of an account to the credit of the consignor, and the bills of exchange drawn in respect of the price of the goods are placed on the other side of the account, the only effect is that when the bills of exchange are paid by the consignee, the debt due to the consignor for the price of the goods is discharged, but no charge on the goods in favour of the consignor is thereby created." That also is a state of circumstances having no application to the present.

(1) 2 Ch. D. 289. (2) 2 Ch. D. 290.

Then the Lord Justice finds, as the result of an examination of the letters and accounts sent by the foreign firm to the English firm, that they amounted to directions to carry only the invoice prices of the goods, and not the proceeds of the goods when sold, to the credit of the foreign firm, and consequently that there was no right to have the goods or the proceeds of them applied in payment of the bills.

Now we have here no document or letter directing the proceeds of the goods to be carried to a particular account or applied in a particular way, but we have a counterfoil attached to each bill of exchange which, it is said, amounts to a specific direction. In my opinion it is impossible to say that this counterfoil has in terms any application to particular goods. The only meaning of it is that "When you have accepted the bills you will become purchasers of the goods I have ordered for you."

Lord Justice *Mellish* then concludes his observations thus (1): "The accounts seem to us nothing more than the accounts an agent may be expected to send to his principal to shew how he has expended the money raised by drawing bills on his principal in the purchase of goods for his principal." So here, the advice in the counterfoil is nothing more than a statement by the agent for the information of his principal of the shipments made by him; and it appears to me to be quite clear that the contention that the counterfoil has the effect of creating a charge upon the goods cannot be sustained and is altogether contrary to established law.

I much regret the decision at which I find myself compelled to arrive in this case, since it is one of mere justice and honesty on the one side, and the law on the other. For what is the real nature of the case? We have *Johnston & Co.* of *Pernambuco* on the one side, and *Johnston & Co.* of *Liverpool*—the same "*Johnston*"—on the other; *Johnston & Co.* of *Pernambuco* receive the proceeds of these goods and thereout pay the debt due to them from *Johnston & Co.* of *Liverpool*, and ignore the Plaintiffs' just claim altogether. A more unfair and unjust transaction could not be, but I feel bound by authority to hold that there is not sufficient in this case to amount either to an

(1) 2 Ch. D. 290.

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hypothecation of the goods or a charge upon the goods, and I am very sorry to have so to decide.

The action must therefore be dismissed.

Marten:—With costs?

BACON, V.C.:—

"*Samuel Johnston*" has acted two parts; you have got in your pocket the Plaintiffs' money, and have succeeded in retaining it. I dismiss the action, but make no order as to costs, for the case is one of plain dishonesty, and I hope the example will not be followed. *Samuel Johnston* of *Pernambuco* and *Samuel Johnston* of *Liverpool* have received the Plaintiffs' money—and kept it.

Solicitors for the Plaintiffs: *Hollams, Son, & Coward.*

Solicitors for the Defendant: *Field, Roscoe, & Co.*, for *Bateson, Bright & Warr, Liverpool.*

G. I. F. C.

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UNITED TELEPHONE COMPANY *v.* LONDON AND GLOBE TELEPHONE AND MAINTENANCE COMPANY.

[1883 U. 325.]

Patent—Infringement—User—Non-destruction of infringing Machines.

Defendants, a telephone company, contracted with an American agent for the purchase of a number of telephones. These machines, known as *Blake* transmitters, having been accordingly made in *America*, were sent to this country, and came into the possession of the Defendants, who kept them unused in a warehouse. The *Blake* transmitters were protected by English and American patents. The Plaintiffs, another telephone company, having in the meantime obtained an assignment of *Blake's* English patent, brought an action for infringement, claiming an injunction and delivery up of the machines. Defendants dismantled the machines by taking out the *Blake* elements, and kept the separate parts stored in a warehouse:—

Held, that the possession of the machines by the Defendants was an infringement of the Plaintiffs' patent rights; and injunction granted.

The Court refused to order the destruction or the delivery up of the infringing machines.

ON the 30th of July, 1877, a patent was granted to *Thomas Alva Edison* for "Improvements in Instruments for Controlling

by Sound the Transmission of Electric Currents and the Reproduction of Corresponding Sounds at a Distance."

On the 20th of January, 1879, a patent, numbered 229, was granted to *William Robert Lake*, as importer, for "Improvements in Telephones;" and by an indenture dated the 8th of January, 1880, this patent was assigned to *Francis Blake*, the inventor. These improvements consisted of a new mode of mounting the elements of the telephone; and the invention became known as the "*Blake* transmitter."

By an indenture dated the 12th of July, 1880, *Edison's* patent became vested in the Plaintiffs, the *United Telephone Company, Limited.*

In the beginning of 1882, the Plaintiff company commenced an action for infringement against *Harrison, Cox, Walker, & Co.*, of *Darlington*, who were manufacturers for the promoters of what afterwards became the Defendant company, called the *London and Globe Telephone and Maintenance Company, Limited.* The action was tried before Mr. Justice *Fry*, in April and May, 1882, and on the 19th of May, 1882, judgment was given for the defendants in that action, on the ground that an instrument called a phonograph described and claimed in the complete specification was not sufficiently indicated in the provisional specification.

By an agreement dated the 26th of May, 1882, followed by an indenture dated the 27th of May, 1882, *Blake's* (formerly *Lake's*) patent of the 20th of January, 1879, was assigned to two directors of the Plaintiff company, as trustees for the Plaintiff company.

On the same 27th of May, 1882, the Defendant company entered into a contract with *F. R. Welles*, of *Antwerp*, an American agent, for the purchase of 800 *Blake* transmitters, royalty paid.

In consequence of the above decision, the Plaintiffs on the 31st of May, 1882, filed a petition of disclaimer and memorandum of alteration, of certain parts of the specification of *Edison's* patent, including the phonograph; and on the 16th of August, 1882, the Attorney-General granted his fiat, allowing the disclaimer upon certain conditions, amongst which was one, that no proceedings for infringement should be taken against (amongst others) the Defendant company, thereinafter called the opponents, in respect of

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1. Any instruments made, or in course of manufacture on the 29th of July, 1882, by, or to the order of, the said opponents or any or either of them.

2. Any instruments manufactured after the 29th of July, 1882, under or in pursuance of any contract *bonâ fide* entered into previous to that date by the opponents, or any or either of them, for the supply of instruments.

3. Any instruments manufactured after the 29th of July, 1882, under or in pursuance of any contracts *bonâ fide* entered into prior to the 29th of July, 1882, with the said opponents, or any or either of them, by any other person for the supply of such instruments to the said opponents, or any or either of them.

4. Particulars of all such instruments as have been or shall be, subsequently to the 2nd of June, 1882, manufactured or delivered, and of all contracts under which such last mentioned instruments have been or shall be delivered, to be furnished to the *United Telephone Company, Limited*, and verified by statutory declaration on or before the 14th of September, 1882.

5. All such instruments as have not been delivered prior to the 29th of July, 1882, to be numbered and marked with proper identifying marks before delivery, and an opportunity to be given to the *United Telephone Company, Limited*, or their agents, to verify the same.

6. Any question of *bona fides* to be referred to and determined by the Attorney-General.

In March, 1883, the 800 *Blake* transmitters arrived in *England*, and went into the possession of the Defendant company, who kept them in a warehouse, unused. It appeared that the royalty under the *Blake* patent had not been paid.

On the 7th of June, 1883, an award was made by the Attorney-General, whereby, after reciting the application for leave to disclaim, and the fiat of the 16th of August, 1882, and reciting that "certain questions arose respecting the making of certain contracts alleged to have been entered into for the making and supplying of certain instruments, and respecting the *bona fides* of such contracts, and which questions were, in accordance with the terms contained in the said fiat, referred to me for my determination"—and that "certain of the parties mentioned in the said

fiat, have appeared before me by themselves and counsel, and have submitted for my determination questions affecting the validity of certain questions set out in the first and second schedules," the Attorney-General determined that of the said contracts, those mentioned in the first and second schedules "were duly and in good faith made and entered into," and in respect of the others that they were not made and entered into in good faith.

The second schedule contained the contract of the 27th of May, 1882, with *Welles* of *Antwerp* for the 800 instruments in question.

This action was then commenced on the 11th of June, 1883, alleging that the Plaintiffs had lately discovered that the Defendant company had manufactured or imported large quantities of telephonic apparatus in imitation of the inventions comprised in the *Blake* patent; and in particular that they had recently manufactured or imported a large number of telephones known as "*Blake* transmitters," and claiming as follows:—

1. That the Defendant company, its servants, agents, and workmen, may be restrained by injunction during the continuance of the said letters patent from manufacturing, selling, supplying, letting on hire, or using, any of the said telephones and telephonic apparatus, or any telephones or telephonic apparatus manufactured according to or in the manner described in the said specification, or according to or in any manner only colourably differing from the same, and generally from infringing the rights of the Plaintiffs.

2. That the Defendant company may be ordered to deliver up to the Plaintiff company the telephones and telephonic apparatus hereinbefore referred to, and all such other telephones and telephonic apparatus as are in the possession or power of the Defendant company which are infringements of the said patent rights of the Plaintiffs.

3. Damages.

4. Payment.

5. Costs and further relief.

Before motion for the injunction, the Plaintiffs' solicitors, on the 22nd of June, 1883, wrote to the Defendants' solicitors as

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follows:—"Without prejudice we will advise our clients to allow the motion to stand to the hearing on an undertaking similar to that given in the case of the *Hummings* instruments, and with similar liberty to that given for the 1000 *Hummings* obtained from *Antwerp*, to re-export them." This offer was not in terms accepted by the Defendant company, but the motion stood over from time to time, and on the 16th of July, 1883, the Defendants' solicitors wrote to the Plaintiffs' solicitors suggesting a mode of putting an end to the action, on the terms of the Defendant company removing the *Blake* elements from the instruments, and substituting another form of transmitter, wholly independent of the *Blake;* the action to be stayed; each party paying their own costs; the compromise to be without prejudice to the Plaintiffs' right to attach any other form of transmitter; the suggestion not admitting infringement, and to be entirely without prejudice. The Plaintiffs' solicitors in answer said that, if the proposal was to deliver up to them the interior portions of the *Blake* instruments, retaining the cases of them, then, if the costs of the action already incurred were paid, they would submit the matter to their clients and see if they would be willing to waive damages, and stay further proceedings. On the 10th of November, 1883, the Defendants' solicitors wrote:—"We beg to give you notice on behalf of the Defendants in this action, that we have no desire to dispute the validity or contest the infringement of the *Blake* patent of 1879, No. 229, and that we are ready and willing to remove from each of the 800 instruments, the subject of this action, all the parts which would infringe said patent, if it were valid, which we do not admit."

On the 23rd of November a statement of defence was delivered. In it, after stating the petition of disclaimer, the fiat of the Attorney-General, and the award of the 7th of June, 1883, the statement proceeded:—

4. The said instruments were, "according to the contention of the Plaintiffs, which was not admitted by the Defendants, constructed in infringement of" *Edison's* patent.

"5. The mounting of the electrodes in the said instruments is admitted by the Defendants to be in accordance with the method of mounting described in the specification of the patent of *W. R.*

Lake, of the 20th of January, 1879, No. 229; but in no other particular do the said instruments, or any of them, come within the description and claims of the said specification.

"6. The Defendants believe that the last named patent is invalid for want of novelty and other reasons, and they do not admit its validity, but they have no wish to use instruments constructed according to the specification of the said patent, and they are ready and willing, in accordance with a notice to that effect given to Plaintiffs' solicitors on the 10th of November, 1883, to remove from each of the said 800 instruments, the subject of this action, all and each of the parts, the use of which would be an infringement of the said patent if it were valid.

"7. The whole of the said 800 instruments were manufactured abroad, and have remained and now are lying unused in the warehouse or offices of the Defendants."

On the 14th of December, 1883, the Plaintiffs' solicitors again wrote to the Defendants' solicitors,—"If the Defendants are prepared to submit to an injunction, as prayed, and pay the costs of the action, our clients will either allow the offending instruments to be re-exported, or will take the opinion of the Court."

The Defendants' solicitors answered by referring to their letter of the 10th of November.

Issue was joined on the 18th of December, 1883.

It was proved in evidence by Mr. *Imray* and others that the machines were fitted with the *Blake* elements; also that they had all been taken to pieces by removal of those elements; that there had been no actual user by the Defendants; and that the separate portions of the machines remained in the custody of Defendants undestroyed.

Theodore Aston, Q.C., *Webster*, Q.C., and *J. F. Moulton*, for the Plaintiffs:—

The Plaintiffs, as owners of both patents, claim an injunction, and either the destruction or delivery up of the instruments, or their exportation.

The allegation in the statement of defence about the fiat has nothing to do with this case. *Fry*, L.J., having decided *Edison's* patent to be bad, the Plaintiffs disclaimed, and then the Defen-

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dants applied to gain protection for the 800 *Blake* transmitters in their possession. This protection they obtained; but it was a protection in respect of the supposed infringement of the *Edison* patent only; it gave no license to infringe the *Blake* patent, which was not before the Attorney-General in any shape or way.

The claim is for the delivery up of the machines; but we now, at the bar, ask for an order for their destruction, which is in accordance with the ordinary practice of the Court: *Cropper* v. *Smith* (1); *Frearson* v. *Loe* (2); *Tangye* v. *Stott* (3).

Hemming, Q.C., and *Goodeve*, for the Defendants:—

The Defendants' case is, that when they ordered these instruments, or first negotiated the order, the Plaintiffs had no rights whatever under *Blake's* patent. But on the 27th of May, 1882, *Blake's* patent came into the hands of the Plaintiffs, a rival company, and they commenced these proceedings. When the Defendants found that the English royalties had not been paid, they locked up the instruments as soon as they got them; they have never used them, and have since dismantled them.

The question is,—is it an infringement of a patent, for which an injunction can be granted, to buy machines and keep them in one's possession unused? The language of letters patent, as prescribed by the statute (15 & 16 Vict. c. 83) is that the patentee "shall and lawfully may make, use, exercise, and vend" his said invention; and that no one else is to "make, use, or put in practice" the said invention. There is a case in which the Court has decided that where a man has, without license, exposed a patented article for sale, that does not constitute an infringement: *Minter* v. *Williams* (4). It is necessary to prove something more than the mere possession of the machines: *Nobel's Explosives Company* v. *Jones* (5). There has been here no such continued user as was held necessarily to accompany possession in *Betts* v. *Neilson* (6), where the patented apparatus was not only kept in store, but was

(1) Pearson, J. Mar. 5, 1883. [S.C. on appeal, 24 Ch. D. 305; *ante*, p. 700.]
(2) 9 Ch. D. 48, 67.
(3) V.-C. W. Feb. 12, 1866; Seton on Decrees, 4th Ed. p. 353.
(4) 4 Ad. & E. 251; 5 L. J. (Q.B.) 60; Goodeve on Patents, p. 210.
(5) 8 App. Cas. 1.
(6) 3 D. J. & S. 82; Law Rep. 3 Ch. 429; Law Rep. 5 H. L. 1; Goodeve on Patents, p. 29.

actually doing work; for here the instruments have been dismantled. As to what is *not* making, using, exercising, or vending an invention, there are observations by *James*, L.J., in *Nobel's Explosives Company* v. *Jones* (1).

Inasmuch as the fact of the Plaintiffs being the owners of *Blake's* patent was unknown to the Defendants for some time after the purchase of the 27th of May, 1882, the Court will not order the destruction of these valuable machines, especially if it turns out that they can, by removal of the *Blake* elements, be turned into *Edison* telephones, as to which the Defendants are protected by the Attorney-General's award of the 7th of June, 1883, or into other telephones which need no protection: *Needham* v. *Oxley* (2).

Moulton, in reply:—

The infringement, if not admitted in terms, is admitted in substance, by the Defendants. Removing the *Blake* transmitters from the machines cannot relieve the Defendants from the liability to be restrained. All the Defendants say is, they have no wish, that is, no immediate wish, to use instruments constructed according to the patent. There is nothing to prevent their altering their intention to-morrow. *Minter* v. *Williams* (3) was a case decided on pleading only.

BACON, V.C.:—

This is really a very simple question, but it has assumed a remarkable shape. That the Defendants are in possession of instruments made in infringement of the Plaintiffs' patent is confessed by them, and placed beyond the possibility of question, and that of itself gives to the Plaintiffs a right to ask for an injunction to restrain the Defendants from making use of that which by their own confession is an unlawful possession and would be, if used, I presume, an unlawful use.

The cases which Mr. *Hemming* has referred to do not in my opinion apply to the case of an injunction in any degree. No doubt, taking the case of the capsules, the use was established

(1) 17 Ch. D. 721, 741.
(2) 1 H. & M. 248; 8 L. T. (N.S.) 604.
(3) 4 Ad. & E. 251; 5 L. J. (Q.B.) 60; Goodeve on Patents, p. 210.

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for the reason which is there given. In the case of *Nobel's Explosives Company* v. *Jones* (1) the case was decided upon totally different grounds, and though there may be expressions in the course of the judgment shewing that the Custom-house clerk never had the use or possession, but that another man had the possession and use, the decision was, that although the Custom-house clerk went down to the docks and got the goods cleared and sent to the place of deposit, that was no reason why the action should be brought against him. That is all the case of *Nobel's Explosives Company* v. *Jones* decides.

The other case is a case of *Minter* v. *Williams* (2) upon special pleading, where the decision of the Court went upon the record as it stood. There was an allegation of breach which was not of itself enough to sustain the general allegation in the declaration, and the demurrer prevailed upon that. I do not think any of the authorities, therefore, have the slightest application to the case before me.

Then it is argued that the Attorney-General's fiat has disposed of this question. I cannot so read it. An application was made to the Attorney-General in a branch of the law in which he is a judicial authority. He was asked to permit a disclaimer from the old patent because it had been found to be erroneous, and he permitted a disclaimer to be lodged. That restored validity to the patent which it would have wanted if the defect had not been cured by that means. But he did it having regard to equitable rights and equitable circumstances which prevent the party who succeeds in getting the disclaimer being let loose to bring actions against everybody who had committed infringements of the original patent. No other subject was before him, and I do not know that it could be. No application was made by the present Plaintiffs to protect their new patent; they did not desire to disclaim anything in their new patent; and I cannot conceive any authority that the Attorney-General would have to deal with that specification. At all events he did not. His fiat is confined wholly to the specification of the old patent—I call it "the old patent" for the sake of distinction—and that has been properly carried into effect, and nobody thinks of disputing it.

(1) 8 App. Cas. 1.

(2) 4 Ad. & E. 251; 5 L. J. (Q.B.) 60; Goodeve on Patents, p. 210.

The facts turn out now to be that the Defendants have in their possession 800 machines which are themselves, as I think they confess sufficiently upon the record, infringements of the Plaintiffs' patent, and they excuse themselves, first on the ground of the fiat which I think gives them no protection, and next, that it is not their intention to use them. If it is not their intention to use the instruments, then the injunction asked for can do them no harm. That would not be enough to dispose of the case, but it is the right of the Plaintiffs to have an injunction against the Defendants who have the means, to the extent of 800 machines, of injuring their patent rights.

Now the defence has a certain air of candour about it which is of course entitled to respect. The Defendants say the question of the *bona fides* of certain contracts was inquired into before the Attorney-General, and he exempted them from any proceedings for infringement at the suit of the Plaintiffs in respect to the 800 instruments which have been the subject of this action. That is proved in evidence to be untrue. The Plaintiffs were not protected respecting the 800 instruments which are the subject of this action, except so far as they relate to the old patent, in which respect they were protected, and which the Plaintiffs in this suit do not seek in the slightest degree to assail. Then in the fifth paragraph of the statement of defence the Defendants say, "The mounting of the electrodes in the said instruments is admitted by the Defendants to be in accordance with the method of mounting described in the specification of the patent of *W. R. Lake* of the 20th of January, 1879, No. 229," with which the Attorney-General has nothing to do, "but in no other particular do the said instruments or any of them come within the description and claims of the said specification." Then paragraph 6 states, "The Defendants believe that the last-named patent is invalid for want of novelty"—they do not join issue about want of novelty, but they say, "they do not admit its validity, but they have no wish to use instruments constructed according to the specification of the said patent, and they are ready and willing, in accordance with a notice to that effect given to the Plaintiffs' solicitors on the 10th of November, 1883, to remove from each of the said 800 instruments, the

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subject of this action, all and each of the parts the use of which would be an infringement of the said patent if it were valid." I cannot conceive a more ample admission of the right of the Plaintiffs to institute this suit, which is instituted solely for the protection of their patent rights, against the use of these things which are called "the mounting of the electrodes," and which have been proved by Mr. *Imray* to be within the last four clauses of the specification, in which the nature of the Plaintiffs' claim is distinctly specified. To the extent of the injunction, therefore, I think the Plaintiffs are entitled, upon the facts proved—upon the unquestionable law of the subject—and upon the ample admission contained in the Defendants' answer. But then the Defendants say that they offered enough when they said they were willing to remove the parts complained of. If that also carried with it an undertaking never to use them again, that might be something, but they might be removed to-day and restored to-morrow, and the whole 800 might be sold, used, and exercised in the way in which the terms of the patent refer to. Against that danger or possibility the Plaintiffs, in my judgment, are entitled to protection in the shape of an injunction.

As to the delivery up, I cannot say I see my way to make any order. The consequence might be to do mere mischief; it might be merely to destroy. All I have to do in this suit is to entertain the Plaintiffs' application that they may be protected against a wrong which is imminent unless prevented by injunction, and therefore, to that extent, I grant the injunction. Damages I have heard nothing about, and I make no order respecting damages, but I grant the injunction in the terms in which it is asked for—that the Defendants be restrained from manufacturing, and so on, the telephones or telephonic apparatus described in the said specification, or only colourably differing. There my present order stops. I do not make any further order. If there should be any infraction of that injunction, the parties who make it will have to account for it, and I think the Plaintiffs must have the costs.

Hemming, on the question of costs, contended that the meaning of the letter of the 10th of November was, that the Defendants

would dismantle the instruments so as that they should have nothing of *Blake's* patent in them, and of course that meant keep them dismantled. They would further, if required, have given an undertaking not to restore. What the Plaintiffs really wanted was to prevent the Defendants using them in any shape.

BACON, V.C.:—

I cannot accept that view, because I do not forget that the Plaintiffs offered, if the Defendants chose to export the machines, to put an end to the action.

Solicitors: *Waterhouse, Winterbotham, & Harrison; Davidson & Morriss.*

J. B. D.

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[1883 D. 1656.]

Pleading—Action on Covenants in a Lease—Statement of Claim—Title to Reversion—Pleading tending to embarrass—Striking out—Rules of Supreme Court, 1883, *Order* XIX., *rules* 4, 27.

In an action upon covenants in an expired lease, the Plaintiff stated the lease, that the term had expired, that at its expiration the Defendants were the assigns of the lease, and liable to perform the lessee's covenants, that the Plaintiff became, and at the expiration of the term was entitled to the immediate reversion in the demised property, subject only to the term that he was and is entitled to enforce all the lessee's covenants, and that the Defendants had for eight years paid him rent:—

Held, such pleading was insufficient, and that the Plaintiff ought also to have shewn what the reversion was which the lessor had, and how the Plaintiff derived his title to that particular reversion.

Accordingly a statement of claim containing the statements so held to be insufficient was ordered to be struck out under Order XIX., rule 27, as a pleading tending to embarrass the fair trial of the action.

Philipps v. *Philipps* (1) followed.

ACTION upon covenants contained in a lease.

The statement of claim began by stating an indenture of lease dated the 5th of June, 1792, of plot A, with the messuages thereon, for eighteen and a quarter years less ten days, and of plots B and C, with the messuages thereon, for ninety-one and a half years less ten days, at the rent of £42, and containing covenants to keep and preserve land-marks, and to keep and surrender in repair. It then stated that the term in plot A had long since expired, and that the terms in plots B and C (with the exception of part which was surrendered to the freeholders in 1880) expired on the 14th of June, 1883, and continued as follows: "At the expiration of the lease of plots B and C the Defendants were the assigns of that lease, and were liable to observe and perform the lessee's covenants therein contained. In the year 1875 the Plaintiff became, and he thenceforth, during the remainder of the term remained, and he was, at the expiration of such term, entitled to the immediate reversion in plots B and C,

(1) 4 Q. B. D. 127.

subject only to the said term, and he was and is entitled to the benefit of, and entitled to enforce all the covenants on the part of the lessee in the said lease contained. The Defendants paid to the Plaintiff, from the year 1875 onwards to the expiration of the term on the 14th of June, 1883, the rent of £42 a year reserved by the lease." It also stated that the Defendants had committed breaches of the covenants contained in the lease, in not preserving the land-marks, in not repairing, and in not surrendering sufficiently repaired; and that particulars of dilapidations had been delivered; and that Plaintiff claimed £1500.

Upon delivery of this statement of claim the Defendants took out a summons for an order under the Rules of Court, 1883, Order XIX., rule 27, that it might be struck out as a pleading tending to embarrass the fair trial of the action, and because it disclosed no reasonable ground of action. This summons was now adjourned into Court.

Stokes, in support of the summons:—

In an action on covenants of this character the Plaintiff can only sue as the assign of the reversion in the term by virtue of the statute 32 Hen. 8, c. 34. The Plaintiff accordingly ought, by his statement of claim, to have shewn, first, that the original lessor had in him a reversion expectant on the determination of the lease containing the covenants on which he sues; secondly, the devolution to himself of that particular reversion to which those covenants are annexed: *Cardwell* v. *Lucas* (1). He has not sufficiently done so, and consequently his pleading does not contain, in compliance with Order XIX., rule 4, a statement of the material facts on which he relies, and is "embarrassing" within the principle of *Philipps* v. *Philipps* (2). As an illustration of our embarrassment, the Defendants were, in the first instance, served with a notice for dilapidations under an agreement for a lease dated in 1791, although they were actually in possession under a lease dated in 1792; and the Defendants cannot tell from the pleadings what kind of case they have to meet. As to the payment of rent by the Defendants, that was only in order to preserve their rights.

(1) 2 M. & W. 111. (2) 4 Q. B. D. 127.

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Fellows, for the statement of claim:—

This statement of claim is a perfectly good pleading in accordance with the rules now in force, which provide (Order XIX., rule 4) that every pleading shall contain, and contain only, a statement, in a summary form, of the material facts on which the party relies, but not the evidence by which they are to be proved. The Plaintiff has pleaded the lease, that the Defendants were the assigns of it, and that from 1875 until and at the expiration of the term the Plaintiff was entitled to the reversion and to enforce the covenants, and it would not have been proper for him to have set out an abstract of his title, or to plead anything which was mere evidence.

Philipps v. *Philipps* (1) is distinguishable. That was an action for the recovery of land brought by a plaintiff who had never been in possession against a defendant in possession, when obviously a mere general statement of title in the plaintiff would be embarrassing and insufficient.

Stokes, in reply:—

The statement of claim does not aver that the original lessor had any reversion at all. [He referred to *Wms. Saund.* (2).]

Feb. 13. KAY, J.:—

It is very plain that this pleading is not sufficient according to the well-established rules of pleading. In a case of this kind, in which the Plaintiff can only sue as the assign of the reversion, by virtue of the statute of *Henry* VIII. and the other statutes which relate to the matter, the proper mode of pleading would be to state that *A. B.*, being seised in fee, or having whatever estate he had, demised by a certain lease something less than his entire interest, and then to state distinctly the mode in which the Plaintiff had become entitled to that reversion, in such manner as to shew that he had a right to sue upon the covenants.

In *Stephen* on Pleading (3) the statement of the rule of pleading is this: "However, it is sometimes necessary to shew the derivation of the fee; viz., where in the pleading the seisin has

(1) 4 Q. B. D. 127.
(2) Vol. ii. pp. 751, 826.
(3) 5th Ed. p. 343; 7th Ed. pp. 250, 254.

already been alleged in another person from whom the present party claims. In such case, it must of course be shewn how it passed from one of these persons to the other. Thus, in debt or covenant brought on an indenture of lease by the heir of the lessor, the plaintiff having alleged that his ancestor was seised in fee, and made the lease, must proceed to shew how the fee passed to himself, viz., by descent;" and then, at p. 347, there is this, "Where a party claims by conveyance or alienation, the nature of the conveyance or alienation must in general be stated, as whether it be by devise, feoffment, &c."

I think it cannot be for a moment denied that this is precisely one of those cases—essentially one of those cases—in which the reversion must be stated, and it must be shewn what the reversion was, whether it was in fee, for years, or what; and then the mode in which the Plaintiff became entitled to that reversion which alone, under the statute, could give him any right to sue upon the covenants, must be stated in terms on the face of the pleadings.

Now, by the present rules demurrers are done away with, and no objection can be taken by way of demurrer. But is it the meaning of the rules, that because demurrers are done away with a plaintiff is released from the ordinary rules of pleading? For instance, take this case—a plaintiff alleges that he is entitled to the estate of some one who died, we will say, in 1792, he is out of occupation, but he says that that estate belongs to him—is it enough for him to plead, "The estate is mine; it belongs to me; I am entitled to possession, and I therefore sue?"

The question came before the Court of Appeal in *Philipps* v. *Philipps* (1), and that was very much the case I have just referred to. It was an action for the recovery of land of which the plaintiff had never been in possession, and the statement was put in two or three ways, so as to give what Lord *Bramwell* speaks of as alternative rights to relief; but no deed or documents under or by virtue of which the plaintiff derived or deduced his title were stated, and the plaintiff confined himself to general averments. These were so worded that it was not possible to demur to the pleadings, because demurrers, which were then allowable,

(1) 4 Q. B. D. 127.

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would have admitted so much as to put the demurring party out of Court; and the question was, whether, under the rule which corresponded, though it was not exactly in the same terms, to the present Order XIX., rule 4, the pleading was or was not embarrassing. The old rule 4 was, "Every pleading shall contain," and now are added the words "and contain only," "a statement," and now are added the words "in a summary form," "of the material facts on which the party pleading relies" and so on, "but not the evidence by which they are to be proved." Essentially, the two rules are for the present purpose exactly the same; and it was held by the whole Court unanimously that the pleading was an embarrassing pleading because it did not state that which the defendant was entitled to have stated for his own protection and that therefore the pleading must be struck out; and this although it was not possible to demur to it successfully.

Now, certainly there is nothing in the new rules which in the least degree interferes with the decision in *Philipps* v. *Philipps* (1). It is true that now there can be no demurrer, and the advantage which was formerly taken by way of demurrer must now be taken in a different way; but this pleading, if the case comes within *Philipps* v. *Philipps*, is entirely within that decision; because there is nothing in the new rules which at all interferes—there is no alteration in Order XIX., rule 4, which makes the least difference so far as the decision in *Philipps* v. *Philipps* is concerned.

The question is (and, as Lord *Bramwell* says, it is a very difficult question in each individual case) whether the pleading is so defective as to be embarrassing.

In this case, the Defendants have a right to know how it is the Plaintiff derives his title to the reversion. I see, on the face of what is stated here, that it is very likely the Plaintiff was in a great difficulty as to that; because in the lease, as stated here, the lessor lets the premises, B and C, for example, for "ninety-one years and half another year, less ten days." Now, one knows very well what that means. That indicates that the reversion was ten days, and that the only interest which the lessor had at the time was in itself a leasehold interest which exceeded, by ten days only, that which he lets here; and I have no doubt

(1) 4 Q. B. D. 127.

it may be extremely difficult, after this lapse of time, the lease having been made in the year 1792, to shew by what means that reversion of ten days came, if it did come at all, to the Plaintiff in this action. But that is the very reason why this strictness of pleading was required, and always has been required, for the protection of the Defendant.

The case seems to me to be absolutely identical in point of principle with *Philipps* v. *Philipps* (1). I can see no kind of distinction between them. I think, for the protection of the Defendants, the Plaintiff was bound to set out, first of all, the nature of the reversion and that he was an assign of the reversion (which he does not allege even in general terms); and, secondly, in what manner he became that assign—the various deeds and documents by which that assignment was made to him; and as he has not done so, I must follow what was done in *Philipps* v. *Philipps* and strike this pleading out, with the costs of this application.

Solicitors: *Yarde & Loader; Stibbard, Gibson, & Co.*

W. W. K.

In re MARSDEN.
BOWDEN *v.* LAYLAND.
GIBBS *v.* LAYLAND.

[1882 M. 3655. 1882 M. 3961.]

Mortgagor and Mortgagee — Executor of Mortgagor — Devastavit—Statute of Limitations.

A testator mortgaged leaseholds and died. His executors took possession of his estate, recovered the rents of the leaseholds, paid the interest on the mortgage, and, without providing for the mortgage debt, made certain payments to the beneficiaries under the will.

In the course of proceedings by the mortgagee for the realization of his security and by a legatee for administration, the executor carried in an account in which he claimed credit for all payments made to the beneficiaries on the ground that under the circumstances the mortgagee must be taken to have acquiesced in such payments, and further that as to such of the

(1) 4 Q. B. D. 127.

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said payments as were made upwards of six years before the action any claim on a devastavit was barred after six years by the *Statute of Limitations*:—

Held, that there was no sufficient proof of acquiescence, and that the executors having acknowledged the mortgage debt by payment of interest, and being bound in equity by a trust properly to deal with the assets, could not set up their own wrong by way of devastavit as a defence in order to claim the benefit of the *Statute of Limitations*.

In re Gale (1) considered.

BY indenture, dated the 20th of September, 1872, *Charles Marsden* demised certain leasehold hereditaments in *Kingsland Road, Shoreditch*, to *J. Mordaunt, G. L. M. Gibbs*, and the Plaintiff *W. C. Gibbs* for the residue of a term of seventy years from the 29th of September, 1863, by way of mortgage for securing the payment of £1721 17*s.* 7*d.* and interest.

By indenture dated the 24th of September, 1872, *Marsden* demised the same hereditaments, and also certain other leasehold hereditaments, No. 204, *John Street, Kingsland Road*, to *G. H. Gibbs* for the respective residues of the said term of seventy years and the term of sixty-eight years from the 29th of September, 1855, except the last ten days of such terms respectively (subject to the said first mentioned mortgage), by way of mortgage for securing the payment of £528 2*s.* 5*d.* These mortgages each contained a covenant in the usual form by the mortgagor for payment of the principal money and interest.

Charles Marsden died in April, 1873, having by his will, made in October, 1871, given the interest of all his property real and personal to his wife *dum sola*, and at her marriage or death half of his said property to his youngest daughter *Jane Fort*, and the remaining half to be divided between his other children, and having thereby appointed *Thomas Layland* and *William Fort* his executors.

The testator was a paper stainer, and at his death his property, in addition to the leasehold hereditaments, Nos. 222 and 224, *Kingsland Road*, and Nos. 3 and 4, *John Street*, comprised in the two mortgages, consisted of cash at his bankers and book debts, stock-in-trade and fixtures belonging to his business, of the value altogether of about £700. The executors took possession of the testator's property and paid certain of his debts. They received

(1) 22 Ch. D. 820.

the rents of the mortgaged property; but they made no provision for the payment of the mortgage debts, though they paid the interest thereon down to Midsummer, 1882. They attempted, however, to find a purchaser for the equities of redemption, but without success, as the leasehold hereditaments were mortgaged up to their full value. The executors also continued the testator's business, and applied the surplus rents in payments for the benefit of the widow and family of the testator, who were in needy circumstances.

Both mortgages having become vested in the same persons, in the month of July, 1882, the mortgagees gave the tenants of the mortgaged properties notice to pay their rents to them; and *William Fort* having died intestate and insolvent in September, 1881, the mortgagees in October, 1882, brought an action against *Thomas Layland* on behalf of themselves and all other the creditors of the testator for the administration of his personal estate, and claimed a declaration that *Layland* was answerable for all moneys received by the executors and not duly applied in payment of debts, and to have the mortgage securities realized and the proceeds applied in payment of their debts in accordance with their priorities.

In their statement of claim the Plaintiffs charged that the executors had paid large sums to the beneficiaries under the testator's will, and were answerable to them for such payments, and that the property comprised in the mortgages had deteriorated in value and was insufficient for the payment of the mortgage debts.

Layland's defence was that the mortgage securities were at the death of the testator, or were treated by the mortgagees as, sufficient securities for their debts, and that they elected to rely upon such securities, and knowingly permitted the executors to deal with the assets on that footing; that such securities being of a wasting character, the Plaintiffs, not being able to place the executors and beneficiaries in the same position in which they would have been under the equitable doctrine of marshalling of assets, if their claim had been made shortly after the death of the testator, ought not now to be allowed to resort to the general

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assets. And with regard to the payments made to the testator's family, or for any other alleged devastavit or misappropriation of assets, he contended that, so far as such devastavit was committed more than six years before the commencement of the action, all claim in respect of it was barred by the *Statute of Limitations*.

Before this action was set down for trial Mrs. *Bowden*, one of the beneficiaries under the will, obtained on the 18th of April, 1883, an ordinary legatee's administration order; and on the 20th of June, 1883, Mr. Justice *Kay* stayed further proceedings in the mortgagees' action, and gave them liberty to attend the proceedings in Mrs. *Bowden's* action, adding to the administration order an inquiry whether the executors had committed any and what devastavit, and were under any and what liability in respect thereof.

The mortgagees appealed against this order, and the Court of Appeal in lieu thereof, on the 6th of November, 1883, made an order, the effect of which was to transform Mrs. *Bowden's* order from a legatee's into a creditor's administration order, with a direction that no payment made by the executors with the consent or acquiescence of the mortgagees was to be disallowed as between them and the executors, and that such payments should be distinguished.

Layland thereupon carried in his account in Mrs. *Bowden's* action, and in it while charging himself with certain assets took credit by way of discharge for the payments which he had made to the widow and family of the testator, and in respect of the carrying on of the business.

The mortgagees objected to these payments, and the Chief Clerk having required evidence as to their consent or acquiescence, upon such evidence being given, decided that the mortgagees must be taken to have known of the carrying on of the testator's business and of the payments to his widow; but not that such payments were in excess of income; and further, that they were precluded from questioning any payment made more than six years before the commencement of the action.

Upon this the matter was adjourned into Court at the instance of the mortgagees.

W. Pearson, Q.C., and *Edwin Ward*, for the Defendant *Layland*:—

The mortgagees allege improper payment of assets, *i.e.*, devastavit, but these payments were made more than six years before action.

Although the remedy of a creditor under the covenants against the estate of the testator continues for a period of twenty years so long as there is estate in the hands of the executor, the moment the executor parts with the assets by way of devastavit the remedy of the creditor becomes a personal remedy against him, which is barred after six years by the *Statute of Limitations*: *Charlton* v. *Low* (1); *Thorne* v. *Kerr* (2); *In re Gale* (3).

[KAY, J., referred to *Obee* v. *Bishop* (4).]

The cases of *Obee* v. *Bishop*, *Brittlebank* v. *Goodwin* (5), and *Woodhouse* v. *Woodhouse* (6), are cases, not as to devastavit by an executor, but of the liability of the executor of an express trustee, and it was held that the analogy of the *Statute of Limitations* could not be set up by the executor in answer to a claim founded on a breach of trust by his testator. An executor is not an express trustee for the payment of the debts of his testator. An executor cannot be sued at law *quâ* executor and at the same time in his own right, as the judgment in the one case would be *de bonis testatoris*, and in the other *de bonis propriis*: *Williams* on Executors (7). If judgment were recovered against the testator *de bonis testatoris*, and at the time of execution no such *bona* remained in his possession, the Plaintiff would have to bring a fresh action against him for a devastavit, in which case the judgment would be *de bonis propriis*, and if six years had elapsed since the devastavit the *Statute of Limitations* would be a bar to such action. At common law, if an executor committed a devastavit and died his executor was not liable, it being a personal tort which died with the person. The statute of 30 Car. 2, c. 7, was passed for the very purpose of remedying this.

The claim against the executor is a personal claim in respect of

(1) 3 P. Wms. 328.
(2) 2 K. & J. 54.
(3) 22 Ch. D. 820.
(4) 1 D. F. & J. 137.
(5) Law Rep. 5 Eq. 545, 553.
(6) Ibid. 8 Eq. 514.
(7) 7th Ed. pp. 1938, 1975, 1987.

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a tort whereby the property of the testator had been lost. At law he can plead the statute, and the same remedy is open to him in equity. An executor does not admit assets by payment of interest on a bond of his testator: *Williams* on Executors (1).

Hastings, Q.C., and *Hadley*, for the Plaintiff:—

The cases as to the remedy at law of a creditor upon a devastavit are not applicable. In equity an executor is answerable as a trustee for all the assets come to his hands. The administration judgment in the action is to that effect, and the executors cannot go behind the judgment. The arguments now used on their behalf would equally apply if they had given the assets away to a stranger or put them in their own pockets. The statute is no bar in a case of breach of trust: *Fordham* v. *Wallis* (2).

They were stopped by the Court.

W. Pearson, in reply.

KAY, J.:—

In this case a testator mortgaged certain parts of his property, and the mortgage deeds each contained the usual covenants for payment of the mortgage debt. He died, and appointed executors, who took possession of his estate, including the leasehold property, which was the subject of the mortgages, and for a long time paid the interest due upon the mortgages, clearly recognising, therefore, the debt. A judgment has been obtained in an administration action against those executors, and in the accounts which are brought into Chambers the executors charge themselves with the receipt of assets, and in the discharge they attempt to introduce certain payments made more than six years ago by them to some of their legatees. The ordinary rule of course is to disallow such payments; they are not a proper discharge as between the executors and the creditors of the estate; but it is said those payments were made more than six years ago, and therefore that all remedies in respect of them are now barred by the lapse of time.

The argument is founded on what takes place at law. It is

(1) 7th Ed. p. 1971. (2) 10 Hare, 217.

said at law a creditor by covenant gets the judgment against the executors *de bonis testatoris*, and if that judgment be executed by *fi. fa.*, and the sheriff finds the executor had once assets, but has parted with them, he may return a devastavit. Then it is said the remedy at law would only be against the executors by a personal action for devastavit, which personal action would be barred by the statute after six years.

All that is very familiar at law, but now the attempt is to apply this in equity, and to test the argument I asked the counsel how far it would go, and I suggested this: Can you contend that executors who had recognised a mortgagee, and paid him interest for many years, would be entitled when bringing their accounts into equity to claim a discharge in respect of money which they had put into their own pockets more than six years ago? Counsel very frankly answered they must go as far as that. That is rather startling certainly. I never yet heard that executors, by way of discharge in equity, as against a creditor, whose debt they acknowledge, as they have been paying interest upon it for many years, could set up their own wrong by way of devastavit, and say we admit a devastavit, knowing of your debt, because we have been paying interest all the while; but seeing that we did it more than six years ago we can set up a defence by treating the claim as founded on a devastavit committed more than six years ago. It is a novel doctrine to me, but I have listened attentively to it, as I was told there were cases which laid that down, and I have been referred to *Thorne* v. *Kerr* (1), and also to *In re Gale* (2), which were supposed to support that doctrine. I certainly dissent from any doctrine of the kind. It seems to me as plain as can be, that where an executor accepts that office he accepts the duties of the office, and he becomes, in the language of *Williams* on Executors (3), a trustee in this sense: "An executor is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office."

Now, what is the ordinary trust when an executor acknowledges a debt and pays interest upon it? Is it not to preserve the

(1) 2 K. & J. 54.

(2) 22 Ch. D. 820.

(3) 8th Ed. p. 1803.

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assets for payment of that creditor, and to take care not to dispose of them, either by putting them into his own pocket, or by paying them away to the legatees, or by otherwise committing a devastavit? Most certainly it is; and in equity the executor is bound by a most direct trust to deal properly with the assets and to apply them in due course of administration of the estate for the creditor he has so acknowledged. That is exactly the language used by, I think, Lord Justice *Turner*, when Vice-Chancellor, in the case of *Fordham* v. *Wallis* (1). He says (2): "We come then to the case of the residuary legatees; and as to these parties also, I am of opinion, that, so far as their interests in the residue are concerned, the statute furnishes no bar"—that is the *Statute of Limitations* furnishes no bar—"and the payment over to them by the executors, whilst the debts were unpaid, was an absolute and unqualified breach of trust." Breach of trust as regards whom? Of course a breach of trust towards the creditors for whom, by the acceptance of their office, they became trustees, and to the payment of whose debts they were bound to apply the assets before they handed over anything to the residuary legatees. That was the breach of trust, and that language shews that the residuary legatee cannot set up the statute because, having received assets from the executors whilst the debts were unpaid, he of course had concurred in the breach of trust by which those assets were handed over.

Therefore I must hold that these items of discharge while the debt was unpaid must be disallowed.

The only remaining question is that of acquiescence.

In my opinion the onus of proving acquiescence is, by the ordinary rule, on the person alleging it; and in order to shew acquiescence he must shew a standing by with full knowledge of what was being done, and an acquiescence in the devastavit. Nothing at all of that kind has been proved, and the only evidence given of that sort has been an attempt to make out, not knowledge, but constructive notice; because the solicitor to the mortgagee was in communication with the executors it is said he had such notice. But, on the other hand, the solicitor absolutely denies it. Even if it were true that the mortgagees' solicitor

(1) 10 Hare, 217. (2) 10 Hare, 226.

happened to be dealing with the executor, and had notice of that kind, I could not treat that as constructive notice for the purpose of fixing the mortgagee, in a case like this, with acquiescence in the devastavit. I think the case is utterly void of proof, and therefore there can be no discharge in respect of those payments on that ground.

Solicitor for *Layland*: *J. W. Miles.*
Solicitors for the mortgagees: *Randall & Angier.*

W. W. K.

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May 14.

MUSGRAVE *v.* BROOKE.

[1882 B. 4657.]

Will—Settlement—Fee Simple Estate—Name Clause—Forfeiture—Repugnancy.

A testatrix, who died in 1832, settled her freehold estate upon her grandchildren, a share becoming vested in one of them, *Lucy*, in fee simple in possession; and the will contained a proviso that any person becoming entitled in possession to the estate should, within one year thereafter, take and use the name of "*Jones*," and that in case any such person should refuse or neglect to use the name of *Jones* within one year, then the estate limited to him or her should be void, and should first go to her niece, *Catherine Jones*, since deceased, for her life, and after her decease to the person or persons next in remainder under the trusts of the will, in the same manner as if the person so refusing were dead. *Lucy* was twice married, and neither she nor either of her husbands ever took the name of *Jones*:—

Held, that the gift being in fee simple, and there being necessarily no person entitled in remainder, the name clause was void, and that there had consequently been no forfeiture by *Lucy*.

FRANCES BROOKE, by her will, dated the 1st of November, 1831, settled her freehold estate at *Luckington* upon her grandchildren in such a manner as that, in the events which happened, a share of it became vested in her three granddaughters, *Theresa*, *Frances*, and *Lucy*, as tenants in common in fee simple in possession; and the will contained the following clause:—

"Provided also, and I do hereby declare my will and mind to be, that all and every person and persons who shall become entitled to the possession of the rents and profits of my said estates at *Luckington*, do and shall within one year next after they respectively shall become so as aforesaid entitled, take upon himself, herself, or themselves respectively and use in all deeds and writings whereto and wherein he, she, or they shall be a party or parties, and upon all other occasions, the surname of *Jones*, and shall and do within the space of one year apply for a license from the Crown or adopt such other means as may be requisite to authorize him, her, or them respectively to take and use the surname of *Jones*. And that in case any such person or

persons shall refuse, or neglect, or discontinue to use such surname and to adopt the means necessary to enable him, her, or them so to do within the space of one year as aforesaid, then from and after the expiration of such one year the use or estate, uses or estates so limited to him, her, or them respectively so neglecting or refusing shall cease, determine, and be utterly void, and that all my said hereditaments and premises at *Luckington* (except as before excepted) shall immediately thereupon first go to my niece *Catherine Dorothy Jones* (if she shall be in being) and her assigns for and during the term of her life. And from and after her decease to the person or persons next in remainder under the trusts of my will, in the same manner as if such person or persons so refusing or neglecting were dead."

The testatrix died in 1832. *Catherine Dorothy Jones* had also been dead some years.

Theresa Brooke and *Frances Brooke* both duly assumed the surname of *Jones*. *Lucy Brooke*, in the year 1845, married *Edwin King Fayle*, and after his death, which occurred in the year 1855, she, in the year 1866, married the Defendant, Admiral Sir *F. W. Richards*, who became entitled under their marriage settlement upon her death and failure of issue of the marriage to all her property absolutely. It was admitted that neither *Lucy Brooke* nor either of her husbands ever assumed the surname of "*Jones*," and a question was now raised in an action for the administration of the estate of *Frances Brooke* whether there had been a forfeiture of the estate which devolved upon *Lucy Brooke*, who died on the 14th of June, 1880, without having had any children.

Everitt, Q.C., and *Dryden*, for the Plaintiff, Mrs. *Musgrave*, a daughter of *Theresa Brooke Jones*, and the heiress-at-law of the testatrix, contended that *Lucy Brooke's* share became forfeited through her failure to assume the surname of "*Jones*."

Cozens-Hardy, Q.C., and *Mytton*, for the first Defendant.

Cookson, Q.C., and *G. I. Foster Cooke*, for the Defendant *F. W. Richards*, the second husband of *Lucy Brooke*, contended that the estate devolving upon *Lucy Brooke* being an estate in fee, the

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condition attached to it by the name clause was void for repugnance: *Re Catt's Trusts* (1); *Bird* v. *Johnson* (2).

PEARSON, J.:—

It appears that this testatrix had a niece *Dorothy*, for whom she evidently had a considerable affection, and in settling her property she settles it so that a certain portion of her estate comes in fee simple to *Lucy Brooke*, who afterwards became, first, Mrs. *Fayle*, and then Mrs. *Richards*, and having so settled it that it came to her in fee simple, she puts in a name clause in these words:—[His Lordship read the clause already set out]. Now I have no hesitation in saying that even if I held a contrary opinion of my own, I should follow Vice-Chancellor *Wood's* opinion in *Catt's Trusts*. The first rule that the Vice-Chancellor lays down is this: that you are to construe a clause of this kind most strictly—that there is to be no ambiguity of any sort or description. The next rule he lays down is, I apprehend, equally sound, that where you find a clause of this kind, the intention of which is to defeat one estate and to give it over, the two limitations, the cesser and the limitation over, must fit in with one another. The case was exactly like the present one, because in that case the limitation was in fee, and the gift over was that it should cease and be void to all intents and purposes, and was to go over in the same manner as if they were dead; and the Vice-Chancellor, commenting on that, says he does not know what is the meaning of going over as if they were dead—to whom was it to go? But I have here a greater piece of foolishness, because being given in fee simple, and there being necessarily no limitation over, it is to go over to the persons named who are entitled in remainder. There could be no such person. Consequently I hold that this clause is absolutely void.

It is then said that there is a gift for life which might take effect, that there is that gift certainly put in in favour of *Dorothy Jones*, and at all events if she had been living she would have been entitled to take at that time. In the first place I have nothing to do with that, because *Dorothy Jones* has been dead for some years, and it is plain that I cannot decide now in 1884

(1) 2 H. & M. 46. (2) 18 Jur. 976.

what *Dorothy Jones's* rights were between 1840 and 1845. *Dorothy Jones* is not here to claim any rights. What happened during that period I do not know; but I do not hesitate to say that my present impression is this, that if this were 1844 instead of 1884, looking at this clause altogether, I should say the clause was bad, and that the simple gift to *Dorothy Jones* for life in that case, with a limitation over if she had died one day after she became so entitled, to persons who did not exist, and who could not exist, shews that the clause was so constructed that you cannot put any reasonable interpretation upon it. Under those circumstances, I think I should have come to the conclusion that *Dorothy Jones* would take no interest whatever, because the clause was bad from beginning to end. I certainly now hold that the name clause is insufficient, and that the property belonged to *Lucy Brooke*.

Solicitors: *Gedge & Co.; Clarke, Woodcock, & Ryland*, agents for *Cooke, Sons, & Dunn, Bristol.*

T. W. G.

LAWRENCE *v.* LAWRENCE.

[1883 L. 1169.]

Apportionment Act, 1870 (33 & 34 *Vict. c.* 35)—*Will coming into operation before the Act—Death of Tenant for Life after the Act.*

A testator who died before the Apportionment Act, 1870, came into operation, gave the income of his residuary estate, which included railway, preference, and ordinary stock, to his wife for life, with remainder to his nephews. The widow claimed under the old law and received the entire dividends upon the railway stock which were declared and became receivable after the testator's death. On the death of the widow the residuary legatees claimed the whole of the railway dividends becoming payable after the death of the widow:—

Held, that the executors of the widow were entitled, under the new law, to an apportioned part of the dividends up to her death.

SPECIAL CASE.

W. Lawrence, by his will, dated the 17th of July, 1865, bequeathed all his undisposed of personal estate to his trustees upon trust to sell and invest upon certain specified securities and to

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pay the income of the trust funds, shares, and securities to his wife during her life, and after her death to hold the said trust moneys, stocks, funds, shares, and securities upon trust to raise certain sums of money therein mentioned, and to hold the surplus in trust for such of the sons of the testator's brothers *Charles* and *Arthur Lawrence* as should be living at the death of the testator and if more than one in equal shares.

The testator made a codicil to his will dated the 30th of April, 1868, and he died on the 15th of January, 1869.

The testator's widow died on the 5th of February, 1883, and appointed the Defendants, *A. Earle* and *H. Perkins* her executors.

The residuary personal estate of the testator included at the time of his death and still included various guaranteed, preference, and ordinary railway stocks. All the dividends upon these railway shares had been declared, and the payments made at various times after the death of the testator, and the entire dividends so becoming due were claimed by and paid to the widow of the testator. Since the death of the widow these railway dividends had in like manner been declared and become payable at various times after her death, and the Plaintiffs, who were the residuary legatees under the will of *W. Lawrence*, now claimed that the whole of such dividends so payable by the respective railway companies belonged to them; whereas the Defendants, the executors of the widow, *Jane Lawrence*, claimed as her legal personal representatives an apportioned part of those dividends down to the date of the death of *Jane Lawrence*.

Cozens-Hardy, Q.C., and *Yate Lee*, for the Plaintiffs, the residuary legatees:—

We submit that the Plaintiffs are entitled to the whole dividend which accrued due after the death of the tenant for life, and that in this case there is no apportionment under the Act. The point has never been actually decided except in the case of *In re Cline's Estate* (1), where Vice-Chancellor *Malins* held that the *Apportionment Act* applied to all instruments, whether coming into operation before or not till after the passing of the Act. That case however was decided upon an unopposed petition, and cannot be

(1) Law Rep. 18 Eq. 213.

considered a conclusive authority. In *Jones* v. *Ogle* (1) the question was whether a declaration of the dividend respecting the profits of a private firm was a dividend or periodical payment within the terms of the Act, but on the question whether the Act could affect the construction of a will previously made, the Lord Chancellor expressed grave doubt. In *Capron* v. *Capron* (2) Vice-Chancellor *Malins* only decided that the Act operated upon all wills which came into operation after the Act, but in this case the testator died before the Act was passed. In *Hasluck* v. *Pedley* (3) the will was dated before the Act, but there was a codicil dated after the Act, so that the will did not come into operation, and was not completely made, before the passing of the Act, and in *Constable* v. *Constable* (4) Mr. Justice *Fry* followed the decision in *Hasluck* v. *Pedley*. Then the 7th section provides that the Act shall not extend to any case in which it shall be expressly stipulated that no apportionment shall take place. Now, when this will was drawn it was impossible for the testator to know there would be such an Act, so he could make no stipulation about apportionment, and it could not be intended to apply to a will made before the Act. We submit therefore that the estate of the tenant for life is not entitled to any portion of dividend which was declared subsequently to her death.

Higgins, Q.C., and *P. Beale*, for the executors of Mrs. *Lawrence*:—

It is quite clear from the decisions already cited that where a will comes into operation after the passing of the Act, then the Act is to apply. Here the will first came into operation before the Act, consequently the widow, who was the first person entitled under that will, claimed and was paid the whole amount of dividend which was declared after the testator's death; but the will did not come into operation till after the passing of the Act as regards the interest left to the residuary legatees, consequently the executors of the widow now get the benefit of the Act. The intention of the 7th section clearly was that the testator should not be prevented if he chose from giving the whole dividends

(1) Law Rep. 8 Ch. 192.
(2) Ibid. 17 Eq. 288.
(3) Law Rep. 19 Eq. 271.
(4) 11 Ch. D. 681.

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without apportionment, and in such cases only the Act would not apply, but the Act was a beneficial measure, intended for the relief of persons who suffered inconvenience and hardship, and unless its enactments were specially controlled the legatees would have the benefit. We say, therefore, that there must be an apportionment of these dividends between the executors of the tenant for life and the residuary legatees.

PEARSON, J.:—

The facts in this case are these: *W. Lawrence* made his will on the 17th of July, 1865. He made a codicil to his will in April, 1868. He died on the 15th of January, 1869, so that his will came into operation before the last *Apportionment Act*, the Act of the 33rd and 34th of the Queen. By his will he gave the income of his residuary estate to his wife for life, with remainders over to his nephews. I need not state the will more particularly than that. The widow died last year. The question that arises, and was argued before me (and it is very strange that it should come to be determined now for the first time, practically fourteen years after the Act came into operation), is this. It appears that the residuary estate consisted to a considerable extent of shares in public companies. Dying as he did before the *Apportionment Act*, 1870, the widow, who was tenant for life of the residue, became entitled to all the dividends which had not been declared before the death of the testator. Dying now in 1883 her representatives say, that although she got the benefit of the old law when she came into possession of the life interest under the will, her estate is now entitled to the benefit of the new law, and is entitled therefore to an apportioned part of the dividend which accrued up to the time of her death. The question is whether or not they are so entitled?

All the cases, I think, in the books touching the *Apportionment Act* were cited to me by counsel in the argument, and I am bound to say, having since looked at them, that there is no one of them that really decides this case. The only one which seems to decide it is the case before the late Vice-Chancellor *Malins* (*In re Cline's Estate* (1)) in which he expressed his opinion, but

(1) Law Rep. 18 Eq. 213.

without argument; the case was not opposed at all, and I think, therefore, Mr. *Hardy* was perfectly justified in saying that this case ought to be considered without reference to that decision. In so doing I feel certain I am acting as my learned predecessor would have done if he were here, because I am sure he would say that having given his opinion upon the former case without hearing argument against that opinion he was quite prepared to consider this case as if it were entirely new, and to alter his opinion if argument induced him to do so.

The question, therefore, simply depends on the Act, and what is the meaning of the Act, and does the Act apply to a case of this kind where the will comes into operation before it. On the one hand it is said that the Act is general in its terms, "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." There is no doubt that in the decisions in the books upon this Act all the Judges have agreed in saying that this being a remedial and beneficial Act full scope is to be given to it, and that you have to construe it rather in an enlarged than in a narrow sense. On the other hand Mr. *Hardy* pressed me very strongly with the 7th section of the Act: "The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place." His argument was a strong argument in support of his view of the case, and was this, that that section shews the Act is not to have any operation on the will where the will has been drawn at a period, and the testator has died at a period, at which he could not by any possibility prevent the Act from operating upon his will. In other words, that inasmuch as before this Act was passed no testator could by possibility have known that the Act would pass, and he was to be entitled if he pleased to prevent the Act having any operation on his will, the Act cannot apply to any will which was drawn before the Act, when the testator could by no possibility have taken advantage of this section if he were minded so to do. However, upon considering

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the case, I have come to a different conclusion. The wording of the section is not only, "The provisions of this Act shall not extend to any case in which it is stipulated that no apportionment shall take place," but it is "in which it is *or shall be*," that is to say, this section only enacts that the testator is left at liberty to dispose of his property as he pleases and in such a manner as he chooses, so as to control the operation of this Act. In other words, if you find words in a will made before the Act that control the apportionment, those words are to have their effect. If a testator chooses to insert such words in a will made after the Act, he is at liberty to do so.

But the words being general I cannot see what power I have to control them. True it is that in the present case owing to the chapter of accidents, the widow gets first of all the benefit of the old law at the beginning of the Act, and her estate will, according to my decision, get the benefit of the new law at the end of it. But this might have been a case in which instead of there being one tenant for life there had been three successive tenants for life, and I want to know why, as between those tenants for life, this Act, which is a remedial and beneficial Act, should not have its proper operation, simply because by an accident the first tenant for life would get an additional benefit. It seems to me, if I were to do this, if I were to say that because the first tenant for life, and in this case the only tenant for life, gets an advantage which in the chapter of accidents she might not have got, that, therefore, she is not to have the benefit of this Act, I must also come to the conclusion that in no case which does not apply simply to a person who could not have got any benefit under the old Act can any person get any benefit under the new one. It seems to me that I should be confining it to very narrow limits indeed if I were to say that the general terms of the Act did not apply to the present case. Therefore I must hold that the executors of the widow are entitled to the apportionment. That disposes of the whole case.

I think the costs should come out of the corpus.

Solicitors: *Freeman & Bothamley; Walker, Son, & Field.*

T. W. G.

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April 29, 30; *May* 5, 28.

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[1882 R. 1829.]

Condition—Repugnancy—Devise in Fee—Restraint on Alienation.

A condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, *e.g.*, to the life of another living person, is void in law as being repugnant to the nature of an estate in fee.

In re Macleay (1) commented on.

Large's Case (2) explained.

A testator devised an estate to his son in fee, provided always that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof, in the lifetime of the testator's wife, she should have the option to purchase the same at the price of £3000 for the whole, and at a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices. The real selling value of the estate was, at the date of the will and at the time of the testator's death, £15,000:—

Held, that the proviso amounted to an absolute restraint on alienation during the life of the testator's widow; that it was void in law; and that the son was entitled to sell the estate as he pleased, without first offering it to the widow at the price named in the will.

SPECIAL CASE.

J. B. Rosher, by his will, dated the 26th of November, 1872, devised as follows:—

"I devise all my manor, commonly called *Trewyn Manor*, and all other my real estate, unto my said son *Jeremiah Lilburn Rosher*, his heirs, executors, administrators, and assigns, according to the tenure thereof respectively. Provided always, and I hereby declare that if my said son, or his heirs or devisees, or any person claiming through or under him or them, shall desire to sell my manor and estate of *Trewyn*, and other my estates in the counties of *Monmouth* and *Hereford*, or any part or parts thereof, in the lifetime of my wife, she shall have the option to purchase the same at the price of £3000 for the whole, and at

(1) Law Rep. 20 Eq. 186. (2) 2 Leon. 82; 3 Leon. 182.

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a proportionate price for any part or parts thereof, and the same shall accordingly be first offered to her at such price or proportionate price or prices. And I also declare that if my said son, his heirs or devisees, or any person claiming through or under him or them, shall during the life of my said wife desire to let *Trewyn House*, garden, buildings, land, and premises, or any part or parts thereof, now in my occupation, for a longer period than three years at any one time, she shall have the option of renting the whole of the lastly described premises for any period exceeding three years as she shall desire, at the yearly rent of £25, and the same shall be first offered to her accordingly; and that if my said son, his heirs or devisees, or any person claiming through or under him or them, shall during the life of my said wife desire to let *Lower Trewyn*, or any part or parts thereof, for a longer period than seven years at any one time, she shall have the option of renting the whole of the said *Lower Trewyn* for any period exceeding seven years as she shall desire, at the yearly rent of £35, and the same shall be first offered to her accordingly."

The testator died on the 26th of November, 1874. This action was brought by the widow against the son. The special case was stated by consent for the opinion of the Court, pursuant to Order XXXIV. of the Rules of Court of 1875.

The case stated that the real selling value of the manor and estate of *Trewyn*, and other the estates of the testator in the counties of *Monmouth* and *Hereford*, was, at the date of the will and at the time of the testator's death, £15,000 and upwards; that the real letting value of *Trewyn House*, garden, buildings, land, and premises, was, at the date of the will and at the time of the testator's death, £100 and upwards per annum; and that the real letting value of *Lower Trewyn* was at the date of the will and at the time of the testator's death £100 and upwards per annum.

The questions for the opinion of the Court were:—

(1.) Whether or not, according to the true construction of the will, the son was entitled to sell or to mortgage or charge respectively the estates devised to him by the will, or any part thereof, without first offering to the widow the option to purchase the

premises so intended to be sold or to be mortgaged or charged at the price named in the will, or at a proportionate price, according to the quantity dealt with, as the case might be, or whether the provisions and directions contained in the will in reference to the option of purchase were null and void?

(3.) Whether or not, according to the true construction of the will, the son was entitled to let the premises called *Trewyn House*, or any part thereof, for a longer term than three years, or the premises called *Lower Trewyn*, or any part thereof, for a longer period than seven years, without first offering to the widow the option of renting the same respectively as directed by the will at the respective rents named therein, or whether the provisions and directions in the will contained in reference to the letting of the said premises or either of them were void and of no effect?

Barber, Q.C., and *Dauney*, for the widow:—

The conditions which limit the rights of selling and leasing are valid in law. There is nothing to prevent the son from mortgaging or charging the property except so far as that may indirectly result from the restraint on sale. Nor is he prevented from cutting timber in a due course of husbandry.

[PEARSON, J.:—There is a restraint on the right to sell; you say there is none on the right to mortgage. What would there be to prevent the devisee from raising as much money as possible by a mortgage of the estate? If so, what would be the value of the restraint? Is not such a condition *ex facie* absurd, and therefore void?]

We say that it is not. The strength of our case is that the testator has not attempted to restrain every kind of alienation; it is a very limited restraint. There is nothing to prevent the devisee from mortgaging the property, if he can find a mortgagee who will accept the title.

[PEARSON, J.:—If the mortgagee were to foreclose could he then sell? or suppose the mortgage contained a power of sale?]

He could sell only on the terms of offering the estates to the widow at the price named by the testator. A partial restraint on

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alienation annexed to a devise in fee is not void: *Jarman* on Wills (1), and the cases there referred to; *Barnett* v. *Blake* (2); *In re Macleay* (3). In the latter case *Jessel*, M.R., decided that a condition in restraint of alienation was good because it was a "limited restriction on alienation." And he said (4), "It is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way." That exactly applies to the present case. That decision has never been questioned; it was referred to in *Dawkins* v. *Lord Penrhyn* (5).

[PEARSON, J.:—Suppose the devisee settled the property, and the settlement contained the ordinary power of sale and exchange?]

Again, a restraint on alienation is good if it is limited in point of time, as during a life in being: *Large's Case* (6). In *Sheppard's* Touchstone (7) it is said, "the grantee may be also restrained from alienating for a particular time," for which proposition *Large's Case* is cited, and Mr. *Preston* adds, "Being a reasonable time; not trenching on the law against perpetuities."

[PEARSON, J.:—You admit that the devisee can mortgage the estate.]

But the mortgagee would only take such estate as the mortgagor has.

[PEARSON, J.:—If he mortgages for £10,000, is not that in effect a sale for £10,000?]

Not within the meaning of the condition.

[PEARSON, J.:—Could the mortgagee foreclose?]

He could only foreclose such estate as the mortgagor has, *i.e.*, an estate saddled with the condition.

[PEARSON, J.:—Is not the effect of the condition that the devisee must not part with the estate?]

(1) 4th Ed. vol. ii. pp. 16 *et seq.*
(2) 2 Dr. & Sm. 117.
(3) Law Rep. 20 Eq. 186.
(4) Law Rep. 20 Eq. 189.
(5) 6 Ch. D. 318; 4 App. Cas. 51.
(6) 2 Leon. 82; 3 Leon. 182.
(7) 7th Ed. p. 130, n.

That might be so if the condition had been limited to the devisee himself, but it extends to any person claiming through or under him or his heirs or devisees. This evidently contemplates a mortgage.

[PEARSON, J.:—Then he may aliene.]

There is nothing in the condition to prevent him from doing so. If the testator had annexed to the devise a condition that his widow should during her life have the option of purchasing the estate for £3000, that would have been perfectly valid. He has done in substance the same thing.

[PEARSON, J.:—Is not the condition repugnant to itself? In *Large's Case* (1) a lease for successive terms of sixty years was held to be a sale within the condition.]

In truth there is here no attempt to restrain alienation; the proviso rather contemplates an alienation. It is less favourable to the widow than an ordinary option to purchase would have been, because it only arises in case the son desires to sell the estate. At the most there is nothing but a partial restraint on alienation, and such a restraint is valid: *Doe* v. *Pearson* (2). There is nothing repugnant to a devise in fee. The condition is not void or repugnant, because what may be presumed to have been the intention of the testator may, by some ingenuity, be defeated. The word "sale" can only be construed in its ordinary popular sense, not as including a mortgage. Gifts of money to a charity by a will on condition that some one else legally brings land into mortmain have been held to be not void under the Mortmain Act: *Trye* v. *Corporation of Gloucester* (3); *Philpott* v. *St. George's Hospital* (4). In the latter case the House of Lords said that if a case was not within the words of the Act the Court had nothing to do with the policy of the Act. The conditions as to leasing the two houses are equally valid.

Cookson, Q.C., *Goddard H. Orpen*, and *A. B. Walford*, for the son:—

The condition is wholly void as being repugnant to the previous

(1) 2 Leon. 82; 3 Leon. 182.
(2) 6 East, 173.
(3) 14 Beav. 173.
(4) 6 H. L. C. 338.

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devise; it prevents the devisee from obtaining the full value for his fee simple estate. If it is good, it would be equally good however small the sum mentioned was at which the estate was to be offered to the widow. The condition is not a good executory devise to the widow. An option to purchase is of the nature of an executory devise. Here it depends upon the son being desirous of selling. An executory devise cannot take effect on the exercise of any right which is incident to the prior estate: *Shaw* v. *Ford* (1). The devise is not a conditional limitation to the son: *In re Machu* (2). It is a condition, and it is in restraint of alienation in one particular mode; it is clearly a restriction on the right to sell, and it is, therefore, void. The question is one of real property law, and it is a pure question of authority. The general rule is that a restraint on the exercise of the right of alienation, which is incident to an estate in fee, is void, *e.g.*, if there was a devise to *A.* in fee, with a limitation that if he attempts to alienate, a charge on the estate shall arise in favour of *B.*, the limitation would be void as being in diminution of the estate devised: *King* v. *Burchell* (3). So also a restraint of alienation by a particular mode of assurance is bad: *Ware* v. *Cann* (4). It has been said by text-writers that a restraint on alienation during a given life is valid, but this proposition is founded on *Large's Case* (5), which has been misunderstood. There the limitation was by way of contingent remainder, and if the condition was broken before the contingency happened, the estate never vested at all. The limitation was really a conditional one, to a person who should answer a particular character at a particular time if he should be then alive and had not aliened. There was no condition in diminution of a prior absolute devise in fee. The text writers have treated the case as if there had been an absolute devise in fee in the first instance; but this is not the true view of the case: *Fearne* on Contingent Remainders (6); *Mandlebaum* v. *McDonell* (7), *Barnett* v. *Blake* (8) was also a case of contingent remainder. In *Churchill* v. *Marks* (9) it is said (10), "In the

(1) 7 Ch. D. 669.
(2) 21 Ch. D. 838.
(3) Amb. 379.
(4) 10 B. & C. 433.
(5) 2 Leon. 82; 3 Leon. 182.
(6) 7th Ed. 272.
(7) 18 Amer. Rep. 61, 79–81.
(8) 2 Dr. & Sm. 117.
(9) 1 Coll. 441.
(10) Ibid. 445.

course of the argument an eminent conveyancer (supposed to be Mr. *Lee*, Q.C.), in answer to a question put to him by the Court, stated his opinion to be, that a gift to *A.* in fee, with a proviso that, if *A.* alien in *B.'s* lifetime, the estate shall shift to *B.*, is valid." As to this, in *Davidson's* Conveyancing (1) it is said, "But this doctrine must, it is conceived, be looked upon as doubtful, as no reason is apparent why a restraint, which, if extending to the whole life of the owner would be bad, should be good if confined to the life of another person." In *Muschamp* v. *Bluet* (2) the devise was to *Henry* and *Michael*, upon condition that if they should sell the land to any man but to *Matthew*, "then he to enter upon it, as of my gift, by this my will," and the Court held that *Henry* and *Michael* had an estate only for their lives. *Matthew* got the estate anyhow. In *Attwater* v. *Attwater* (3) the condition was, "Never to sell it out of the family; but, if sold at all, it must be sold to one of his brothers," and Lord *Romilly*, M.R., disregarding *Doe* v. *Pearson* (4), went back to the fountain head (5), and held that the condition was void for repugnancy.

[PEARSON, J.:—In the present case the condition is, not that the devisee shall not sell except to a particular person, but that, if he desires to sell, he shall offer the estate to a particular person at a fixed price.]

That is a fetter in favour of the particular person on the right of alienation; the vice of it is in the limit of price. In *Billing* v. *Welch* (6) it was held that a covenant prohibiting alienation except to a certain specified and limited class, and reserving a penal rent for the breach of the covenant, was void as being repugnant to the nature of an estate in fee simple. Many of the observations of *Jessel*, M.R., in *In re Macleay* (7) are in our favour, and so far as they are against us he is merely adopting what is said in *Sheppard's* Touchstone. But the case was not

(1) 3rd Ed. vol. iii. pt. 1 p. 111, n.
(2) Sir J. Bridg. 132.
(3) 18 Beav. 330.
(4) 6 East, 173.
(5) Co. Litt. 223 a.
(6) I. R. 6 C. L. 88.
(7) Law Rep. 20 Eq. 186.

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argued, for counsel appeared only on one side. The principle, however, is plain, viz.: that the power of alienation which is necessarily incident to an estate in fee cannot be fettered by a subsequent condition. The two things are repugnant and cannot stand together, and the original gift must prevail. In the present case the power of alienation is in substance taken away by the condition. If the word "sell" is to be taken as meaning only "sell" in the ordinary popular sense of the word, still the condition would practically prohibit a mortgage, for no mortgagee would take a security which he could not realize during the life of the widow. If the word "sell" includes "mortgage," that assists our argument. The condition in restraint of letting is equally repugnant to an estate in fee. The condition may be said to be void for uncertainty, for who is to say when the son may "desire" to sell the property? Conditions defeating an estate must be construed very strictly: *Clavering* v. *Ellison* (1). They must be clear and precise in their operation: *Viscount Exmouth* v. *Praed* (2); *Mildmay's Case* (3). The late Mr. *Joshua Williams*, in his book on the Settlement of Real Estates, says (4), that *In re Macleay* (5) was questioned by V.C. *Malins*, in *Dawkins* v. *Lord Penrhyn*, which, however, is reported only on the appeal (6). Mr. *Williams* also points out (7) the distinction between a condition that the devisee shall not alienate to a particular person or class, and a condition that he shall not alienate except to a particular person or class. The condition in the present case is of the latter description. None of the old books say that a restraint on alienation is good if it is limited to a particular period of time; that proposition appeared for the first time in *Sheppard's* Touchstone, and it is founded on a misapprehension of *Large's Case* (8). In *Theobald* on Wills (9) it is said that a restraint upon alienation limited in time not followed by a gift over is ineffectual. In the present case there is no gift over and no penalty is imposed for breach of the condition: *Hood* v. *Oglander* (10).

(1) 7 H. L. C. 707.
(2) 23 Ch. D. 158.
(3) 6 Rep. 40 a.
(4) Page 136.
(5) Law Rep. 20 Eq. 186.
(6) 6 Ch. D. 318.
(7) Page 135.
(8) 2 Leon. 82; 3 Leon. 182.
(9) 2nd Ed. p. 459.
(10) 34 Beav. 513.

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Barber, in reply :—

The *dicta* of *Jessel*, M.R., in *In re Macleay* (1) are fully justified by the text-writers. A partial restraint on alienation is valid, and, as *Jessel*, M.R., said, there are other modes of alienation besides selling. The condition in the present case, construed literally, does not include a mortgage, and effect must be given to the words "any person claiming through or under him or them." The condition is not repugnant nor is it uncertain. "Desire to sell" means "sell." In the legal sense of the word there is no restraint on alienation at all, and, if there is, it is a valid restraint. The decision in *Large's Case* (2) did not depend upon the gift being a contingent remainder; it was founded on the restraint being limited to a particular period of time. *Sheppard's* Touchstone is a recognised authority, and he states the law in this way. His view is adopted by Mr. *Preston*, who only adds that the period of time must not trench on the law against perpetuities. It is stated in the same way in a note by Mr. *Fraser* to *Mildmay's Case* (3); in *Tudor's* Real Property Cases (4); and in *Jarman* on Wills (5).

[PEARSON, J.:—Is not *Large's Case* the only case as to a restraint limited in time?]

I believe it is. In *Barnett* v. *Blake* (6) it was not even suggested that the condition was bad. Mr. *Joshua Williams* in his book on the Settlement of Real Estates, says (7), that "there is nothing contrary to the policy of the law in a condition which imposes merely a partial restraint on the power of alienation." The argument of Mr. *Preston* in *Ware* v. *Cann* (8) exactly applies to the present case.

[PEARSON, J.:—The Court decided against him.]

But the facts were different from those of the present case. In *Dart's* Vendors and Purchasers (9), it is said that the limits of

(1) Law Rep. 20 Eq. 186.
(2) 3 Leon. 182.
(3) 6 Rep. 40 a. (Thomas & Fraser's Ed.), vol. iii. p. 339.
(4) 3rd Ed. p. 972.
(5) 4th Ed. vol. ii. p. 18.
(6) 2 Dr. & Sm. 117.
(7) Page 134.
(8) 10 B. & C. 433, 436.
(9) 5th Ed. vol. i. p. 19.

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the validity of such conditions are not very clearly defined by the authorities, and that is a correct statement. But in the present case the condition does not restrain the devisee from alienating; it only makes it unlikely that he will sell. It is in effect a charge on the property in favour of the widow. The conditions as to leasing are equally valid; they only apply to the widow personally, and give her a right of occupation during her life.

May 28. PEARSON, J., after stating the facts, continued:—

The question I have to decide is whether, there being an absolute devise in fee simple to the son, the conditions annexed to it are valid. I will deal first with the condition which relates to selling, and it will, I hope, shorten the observations which I have to make if I first state the manner in which I interpret this condition.

The restriction upon selling is this, that if the son, or any person claiming through or under him, is minded to sell during the lifetime of the testator's widow, the estate intended to be sold, whether it is the whole or only part of the devised estates, must be offered to the widow at the price of £3000 for the whole, or at a proportionate price for a part. It is agreed that the value of the whole estate at the death of the testator was £15,000. It is, therefore, in effect a condition that, if the son desires to sell, he shall offer the estates to the widow, and that she is to be at liberty to buy them at one-fifth of their value. I consider that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale during the life of the widow. I mean to treat it as if it had been, "during the life of the widow you shall not sell," because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all. And I think there is authority for that conclusion, for in *Bragg and Tanner's Case* (19 Jac. 1) (1) it was held by Justices *Dodridge* and *Chamberlain*, that if a feoffment be on condition that if the feoffee alien he shall pay £10 to the feoffor, this is a good condition; but the Chief Justice and *Haughton*, J., held

(1) Sheppard's Touchstone, 7th Ed. vol. i. p. 130.

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the contrary, for then this shall be a circumvention of the law. And in *Billing* v. *Welch* (1) that case is thus referred to in the judgment of the Court of Queen's Bench, delivered by Mr. Justice *O'Brien* (2). "The author (*Sheppard*) then refers to a case in which *Dodridge* and *Chamberlain*, JJ., held, that if a feoffment be on condition that if the feoffee alien he shall pay £10 to the feoffor, the condition would be good; but in which case the Chief Justice and *Haughton*, J., held the contrary, on the ground that this would be a 'circumvention of the law.' In our opinion, the ruling of the Chief Justice and *Haughton*, J., was the correct one. If a covenant be held good which, in the event of a grantee in fee simple aliening the land, merely imposes a fine upon him (or an additional rent on the lands, as in the case before us) the general rule might be evaded and the principles of it violated by fixing such an amount of fine or additional rent as would effectually prohibit the alienation, which would clearly be a 'circumvention of the law.'" To my mind, to compel the son in the present case, if he chose to sell, to sell at one-fifth of the value of the estate, is really a prohibition of alienation during the widow's lifetime. The question, then, which I have to determine is this, is it or is it not the law that to a devise in fee simple you may annex a condition that during a limited period the devisee shall not sell at all?

Now, in order to determine this question we must go back to that which is to a great extent the fountain-head of the English law, I mean *Coke* upon *Littleton*. There it is said (*Co. Litt.* (3)): "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands or tenements (*pur ceo que quant home est enfeoffe de terres ou tenements*) he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason; and therefore such a condition is void." And Mr. *Charles Butler*, in a note to sect. 362, says: "A power of suffering a common recovery, and of levying a fine within the statutes of 4 Hen. 7, and

(1) I. R. 6 C. L. 88. (2) I. R. 6 C. L. 101.

(3) Sec. 360.

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32 Hen. 8, is so inseparably inherent to the estate of a tenant-in-tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But it does not vitiate the grant of the estate tail to which it is annexed; because (to use an expression of Lord *Hobart*) a condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding it, neither in anything expressed, nor in anything implied, which is, of its nature, incident to and inseparable from the thing granted." I conceive, therefore, that Mr. *Charles Butler*, on the same ground, must have said that the power of sale is a thing incident to and inseparable from an estate in fee simple, and that a condition against selling annexed to such an estate is absolutely void. But I think Lord *Coke's* observations in *Mary Portington's Case* (1) make the matter still plainer. He says: "And it was well observed in this case. That to an estate tail there are three manner of incidents; some by the common law, others by Act of Parliament, and some by custom. By the common law such as are not restrained by the statute and cannot be restrained by any condition, as dower and tenancy by the courtesy after issue, are incident to an estate tail, and cannot be restrained by condition. Also the estate of him, and of tenant in tail after possibility, are dispunishable of waste, so a collateral warranty is a bar to an estate tail, and a common recovery also, and none of these can be restrained by any condition or limitation. By statute law, as to make leases by the statute of 32 Hen. 8, c. 28, and to levy a fine by the statute of 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, to bar issues, and none of these which are incidents to his estate by Act of Parliament may be restrained by condition: for when a man makes a gift in tail, he *tacitè* gives these incidents to it; and therefore to restrain them by condition or limitation would be repugnant. For suppose that a man makes a gift in tail, and further grants that he may make leases for years or lives according to the said Act; or to levy a fine with proclamations according to the Acts in such case to bar his issues; provided always that he shall not make leases or levy a fine; none will deny but such proviso would be repugnant; and by consequence

(1) 10 Rep. 35 a, 38 b.

in the other case, when such incidents are tacitly implied; for *expressio eorum quæ tacitè insunt nihil operatur.*" And so in the case of a devise in fee simple, if I may translate it adapting this illustration of Lord *Coke's*, "I devise *Black Acre* to *A.* and his heirs, in fee simple, and I give him power to mortgage, lease, or sell the estate, or any part or parts thereof, from time to time, and at all times or at any time, in any market, to any person or persons, upon such conditions or terms as he shall from time to time in his own absolute will and pleasure determine. Provided always, that he shall not sell either during his own life or during the life of *B.*" I think, when you write out the devise in full in that way, every one would say that the condition is repugnant to the grant which has been previously made, and, of course, if the matter had stopped there, there would have been no difficulty whatever in this case. The question to be determined would have been simply whether the condition was in whole or in part repugnant to the gift to which it was annexed, and if so, it would necessarily be void.

But it is impossible to shut one's eyes to the fact that some exceptions at all events have been made to this general law. The general law seems to me to stand upon principles about which there can be no doubt, and which are easily intelligible. But in the very next section of *Littleton*, sect. 361, there is this: "But if the condition be such, that the feoffee shall not alien to such an one, naming his name, or to any of his heirs, or of the issues of such an one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good." I confess I am absolutely at a loss to understand how that exception arose, because it is plainly just as much repugnant to the gift as any other condition would be, for the implied power given to alien to any person or persons he pleases includes a liberty to alien to *J. S.*, if he chooses to do so. It seems to me that, unintentionally and unwittingly, another principle has been applied here (forgetting entirely that the question whether a condition was good or bad should be determined by its repugnancy to the prior gift), and that the question of policy has been allowed to intervene, omitting altogether

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all considerations of repugnancy. Just as a general restraint of marriage was always held to be bad, but a restraint of marriage to one particular individual was held to be good, so, in the same way, although a restraint of alienation in general was decided to be bad, it seems to have been thought that a restraint of alienation to one individual or his issue was not bad. I confess I wish that the law had been allowed to stand on the simple question of repugnancy, because then there would have been no uncertainty and no confusion. In *Muschamp* v. *Bluet* (1), an attempt was made to introduce a converse condition, that is, a condition that the devisee should alien only to one individual named, and that was held to be bad. But it is impossible not to see that, although that was held to be bad, the principle of the decision has certainly been departed from in later times; I refer to those cases which led up to *In re Macleay* (2), before Sir *George Jessel*, M.R. There are two older cases, viz., *Daniel* v. *Ubley* (3), and *Doe* v. *Pearson* (4). Those cases were followed by *Attwater* v. *Attwater* (5), before Lord *Romilly*, M.R., and, finally, by *In re Macleay*, upon which I shall have to make some observations. They do not actually meet the present case, because they were not cases of restraint of alienation for a limited time as this is, but of restraint of alienation except to a particular class of persons, and the question was whether the condition was within the rule as being repugnant to the gift. In *Daniel* v. *Ubley* the devise was, "I give and bequeath to *Agnes*, my wife, my house, &c., to dispose at her will and pleasure, and to give to such of my sons she thinks best." It appears that *Jones*, J., thought that the wife had an estate for life, with power to dispose of it at her pleasure during her life, and a power to give the reversion to any one of the sons of the devisor. If that is really a correct translation of the devise,—that the widow took merely an estate for life, with a power to appoint the estate in reversion to any of the sons, I need not say that *Daniel* v. *Ubley* would not touch the present question at all, and I cannot help thinking that, if

(1) Sir J. Bridg. 132.
(2) Law Rep. 20 Eq. 186.
(3) Sir W. Jones, 137.
(4) 6 East, 173.
(5) 18 Beav. 330.

Daniel v. *Ubley* (1) were to be decided at the present day, the opinion which was expressed by Mr. Justice *Jones* would be held to be substantially right. But it is impossible to ignore the fact that different Judges have taken different views.

I will now read from the judgment of Sir *G. Jessel*, M.R., in *In re Macleay* (2), because it is sufficient for me to refer to what he there quotes from these cases. He cites Lord *Ellenborough* in *Doe* v. *Pearson* (3); and Lord *Ellenborough* says, "For, according to the case of *Daniel* v. *Ubley*, though the Judges did not agree as to the effect of the devise, yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and, if she did not, that the heir might enter for the condition broken." Now that is a stronger case still, because, as Lord *Ellenborough* and the other Judges of the Queen's Bench read *Daniel* v. *Ubley*, all the Judges agreed in the time of Sir *W. Jones* that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to anybody else; it was limited. The Master of the Rolls continues (4), "There Mr. Justice *Dodridge* (5) said, 'He conceived she had the fee, with condition, and if she did alien, that then she should alien to one of the children,' which is a very limited class; and he finally concluded by saying that, 'her estate was a fee, with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons.'" With all respect to the memory of Mr. Justice *Dodridge* I think that sentence shews that the two parts of the gift are about as repugnant as could well be. He first says that the estate was in fee, with liberty to her to alienate if she would, and then follows, "but with a condition that if she did alienate then she should alienate to one of her sons." How the two could co-exist I honestly say I cannot understand. Then Sir *G. Jessel*, M.R., says (6), "in *Doe* v. *Pearson* the gift was a gift in fee upon this special proviso and condition, 'That in case my said daughters *Ann* and *Hannah Collett*, or either of them, shall have no lawful

(1) Sir W. Jones, 137.
(2) Law Rep. 20 Eq. 186, 190.
(3) 6 East, 173.
(4) Law Rep. 20 Eq. 191.
(5) Latch. 37.
(6) Law Rep. 20 Eq. 190.

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issue, that then and in such case, they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children.' Now it is to be observed that the number of alienees possible in that case was smaller than the number in this case; there it was limited to 'her sister or sisters, or their children,' . . . So that the case of *Daniel* v. *Ubley* (1) is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the Judges gave an opinion that it would be good, and following that old authority, Lord *Ellenborough* and the Judges of the Queen's Bench, in *Doe* v. *Pearson* (2), in the year 1805, held that the condition was valid."

I ask myself, and with all respect I hope for the learned Judges who decided those cases, what was the principle upon which they went, and how by any possibility that principle is to be applied to other cases in the future? In *Daniel* v. *Ubley* the widow was to alienate to one of her sons; in *Doe* v. *Pearson* the discretionary power of alienation was limited "to her sister or sisters, or their children." What am I to say is the principle? Is it that there may be a condition that, if you alienate, you must alienate to a member of your own family, or that you must look to the number of the individuals to whom the alienation is permitted, or when there are a number of individuals (not knowing at the present moment what that number may be), am I to inquire whether they are able, or likely to be willing, to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if from their poverty they are unable, or from other circumstances are unwilling, am I to say that the condition is bad? It seems to me that the adoption of any such rule as that would produce the greatest uncertainty and confusion; in fact it would be absolutely impossible for any Judge to apply such a rule to any case which might come before him, unless the facts of the case were absolutely identical with those of some previously decided case.

(1) Sir W. Jones, 137. (2) 6 East, 173.

In *Attwater* v. *Attwater* (1), no doubt, Lord *Romilly* challenged the correctness of the decision in *Doe* v. *Pearson* (2). In *In re Macleay* (3) Sir *G. Jessel*, M.R., thought that, as *Doe* v. *Pearson* was decided in the year 1805, it was too late to go contrary to it, and, having in *In re Macleay* a devise which was very similar to that in *Doe* v. *Pearson*, he followed what he conceived to be the rule in *Doe* v. *Pearson*, and decided that the condition in *In re Macleay* was a valid condition. If there were nothing else in *In re Macleay* I do not think I need have discussed it any further, because the condition with which I have now to deal is not like the conditions in any one of the cases to which I have referred. But, no doubt, there are some observations of the Master of the Rolls in *In re Macleay* which were very strongly and very properly relied upon by Mr. *Barber*, because the authority of Sir *G. Jessel* is very great. I cannot possibly ignore those observations, and I feel bound to take exception to them, for I cannot agree with the propositions which they lay down. After citing those sections from *Littleton* to which I first referred, and also referring to *Muschamp* v. *Bluet* (4), Sir *G. Jessel*, M.R., says (5): "So that, according to the old books, *Sheppard's* Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance and not of mere form." I apprehend that the meaning of the word "substantially" is this: Does it really deprive the devisee of the power of alienation, or does it only so restrain it that in effect he still has the power of alienation? If the latter it is good. The Master of the Rolls continues: "Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against

(1) 18 Beav. 330.
(2) 6 East, 173.
(3) Law Rep. 20 Eq. 186.
(4) Sir J. Bridg. 132.
(5) Law Rep. 20 Eq. 189.

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selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shews there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless *Coke* upon *Littleton* has been overruled, or is not good law, this is a good condition." With all deference to Sir *G. Jessel*, I do not find in *Coke* upon *Littleton* that which he seems to have found, and I must say this, that when you refer to *Coke* upon *Littleton*, with all deference to that learned Judge, one must bear in mind that he was not always consistent with himself. I find, for instance, this (1): "And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the estate be lawful, yet the condition is good, because the reversion is in the donor." When, however, I turn to *Sir Anthony Mildmay's Case* (2), I find this: "So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant." I find also this (3): "If a man make a gift in tail, upon condition that he shall not make a lease for three lives, or twenty-one years, according to the statute of 32 Hen. 8, the condition is good, for the statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the Act, according to that rule of law, *quilibet potest renunciare juri pro se introducto*." And in *Mary Portington's Case* (4), there is this: "For suppose that a man makes a gift in tail, and further grants,

(1) Co. Litt. 223 b.
(2) 6 Rep. 43 a.
(3) Co. Litt. 223 b.
(4) 10 Rep. 39 a.

that he may make leases for years or lives according to the said Act; or to levy a fine with proclamations according to the Acts in such case to bar his issues; provided always, that he shall not make leases, or levy a fine; none will deny but such proviso would be repugnant; and, by consequence, in the other case, when such incidents are tacitly implied"—that is, whether the incidents are mentioned or not, you cannot make a condition of that kind. I think, therefore, Lord *Coke* must be read with a certain amount of caution, and I may say that, if any one will take the trouble to read two or three passages in *Sheppard's* Touchstone, he will find that the learned professors of the law are perpetually at loggerheads as to what is a good condition, and the reason is that they have departed from the first principle, that a condition which is repugnant to a gift is a void condition, and the exceptions have been made without any principle at all, and it is therefore perfectly impossible to say by any rule what exceptions are good and what are bad.

I should be very sorry to do Sir *George Jessel* any injustice, and I must honestly say that in attempting to criticise so able and learned a Judge I am always afraid of falling into some error myself, and I am not quite certain that I understand correctly the extent to which in those passages he means to go. If he means to assert that, provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is, that I most respectfully differ from him, and I cannot understand how, after he had cited the maxim from *Coke* which he had quoted, he should have tried to lay down any such doctrine. Applying what he says to the present case, does he mean that, the estate being worth £15,000, although there is a restriction against selling, the son might immediately mortgage it for £15,000, or might lease it for 999 years? I can only say that it seems to me that both those things are hit by the maxim which he quotes with the greatest approbation, *quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum:* and that this would be an infringement of any such condition is proved (if proof were wanting) by *Large's Case* (1), where, there being a gift to a son with a condition annexed to it that he was not to

(1) 3 Leon. 182.

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alienate within a particular time, he having granted four leases for sixty years to begin one after the other, it was held that they came within the prohibition. And in any case, if you are to hold that, though there is a prohibition of sale in the ordinary sense of the word "sale," still you may dispose of the estate in any other way, the condition so construed to my mind would be an absurd one; and, if not absurd, I am perfectly satisfied that the Court would never now allow advantage to be taken of it because something had been done in one way which might have been done effectually in another way.

It still remains for me to consider whether there is any decision that a condition absolutely restraining alienation is good if there is a limitation as to time, because, although I have dealt with these cases in order to clear the way with regard to the foundation upon which all the exceptions rest, still, as I hold that the exceptions stand on a principle absolutely removed from that of repugnancy, there may yet exist an exception which can be made to the condition, and which will be good by reason of a limitation of time.

The authority cited to shew that this is so is *Large's Case* (1). I am going to cite it from the American case, *Mandlebaum* v. *McDonell* (2), which contains a very elaborate and able judgment upon this part of the case. The very same point which arises now arose then before the American Court. The judgment of the American Court refers to *Large's Case* thus: "As reported (3) the same devise is stated as follows:—'*A.*, seised of lands in fee, devised the same to his wife till *William*, his younger son, should come to the age of twenty-two years, the remainder when the said *William* should come to such age, of his lands in *D.* to his two sons, *Alexander* and *John*, the remainder of his lands in *C.* to two other of his sons, upon condition, *quod si aliquis dictorum filiorum suorum circumibit vendere terram suam*, before his said son *William* should attain his said age of twenty-two years, *in perpetuum perderet eam.*'" It seems to have been held by the text-writers that this therefore was a condition attached to a devise, not to sell within a limited time, and that that condition was good, because it was held that one of the sons, who had

(1) 2 Leon. 82; 3 Leon. 182. (2) 18 Amer. Rep. 61, 80. (3) 3 Leon. 182.

gone about to grant leases for terms of sixty years in succession, had broken the condition, and that the breach of the condition might be taken advantage of. But Mr. Justice *Christiancy* points out, I think with perfect accuracy, that when you come to look at the case there was no devise of the fee simple of that kind. There was only a contingent remainder limited to the son, upon condition that before he came into possession, that is to say, before he attained twenty-two, he should not sell. That being so, the son having sold before that time, it was held that he could not qualify himself to take under the contingent remainder, that the contingent remainder therefore failed altogether, and the estate passed away from him. Now the first citation of this case which deals with it as if it had decided that a limitation as to time made a condition of this kind good is in a note in the 7th edition of *Sheppard's* Touchstone (1) (it is not in *Sheppard's* Touchstone itself). The note originally ran thus: "And the grantee may be also restrained from alienating for a particular time: *Large's Case* (2)." Then Mr. *Preston* adds in brackets, "Being a reasonable time; not trenching on the law against perpetuities," and the note thus inserted in *Sheppard's* Touchstone has no doubt been copied into a good many other text-books. But there has been no judicial decision to that effect; and it is a very curious thing that, although *Littleton's* book is more than 400 years old, and although Lord *Coke* died 250 years ago, there is not a single judicial decision to be found in the books shewing that a limitation as to time added to such a condition makes it a valid condition. I perfectly admit that, although there has been no such judicial decision, yet if I could find that this had been an accepted *dictum* of law, and that it was likely to have affected divers contracts and dealings between man and man, and that by not following it I should be disturbing anything which had been done in former times over and over again on the faith of the *dictum*, I should feel myself bound by it and I should decline to decide in opposition to it. I hold most strongly that what the present Master of the Rolls (then *Brett*, L.J.) said in *Lohre* v. *Aitchison* (3), in regard to policies of insurance, ought to be

(1) Page 130. (2) 2 Leon. 82; 3 Leon. 182.
(3) 3 Q. B. D. 558, 561.

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applied to all doctrines affecting conveyances. He said: "The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognised rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our view of the binding force of those rules, and the reasons why they have a binding and exclusive force. They are rules which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognised by the Courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract. And though a Court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as parts of the contract, or as agreed modes of carrying it out." I think it would be exceedingly mischievous to attempt to alter any rule which had been adopted and acquiesced in for more than a century. But in the present case I am bound to say that I cannot imagine that this supposed rule has ever been acted upon, because, to begin with, it is so vague that I am perfectly certain that no counsel capable of advising a client would have advised his client to act upon it without better information than we possess at present as to what the rule means. What is the meaning of "a reasonable time"? Does it extend, as Mr. *Preston* thinks, to a time so long that it does not trench on the law against perpetuities? Does it simply extend to the life of the individual himself, or to the life of some other person, or is it to be applied in different cases according to the circumstances of each case? Is each Judge before whom the question comes to decide whether the time mentioned in the particular condition is a reasonable time, or is it to depend upon some other

unknown quantity which this Court has yet to decide? I find that the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift is a plain and intelligible rule. So far as I can find that any exception to the rule has been laid down and judicially decided, I am bound by that exception. But I will not add other exceptions for which I can find no authority, and the addition of which, to my mind, will only introduce uncertainty and confusion into the law which we have to administer. I must therefore, as regards the condition which relates to selling, declare that it is void.

I have now to deal with the condition as to leasing. It is agreed that the real leasing value of both the properties was £100 per annum. I will assume in favour of the condition that it does not enable the widow to require an indefinite lease, I mean a lease for 999 years or for a very long period, but that the utmost she could require would be a lease for the period of her own life. I think, nevertheless, that the same principle applies to the power of leasing as to the power of sale, and for the reasons before given, because the power to lease is just as much an incident to an estate in fee simple as the power to sell; and inasmuch as the restriction amounts to this, that the widow is to have a lease at one-fourth of the real rent, I think that it is an absolute restriction in the one case upon leasing for more than three years, and is void. The condition as to leasing the other property is practically the same, and is void for the same reason. I must, therefore, answer the questions by saying that both the restriction upon the power of selling and the restriction upon the power of leasing are invalid.

Solicitors for Plaintiff: *R. J. Child & Son*, agents for *Sayce & Baker, Abergavenny.*

Solicitors for Defendant: *J. T. & G. F. Marshall*, agents for *Gabb & Walford, Abergavenny.*

W. L. C.

END OF VOL. XXVI.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1884, will be as follows:—

In the First Series,
25 Ch. D.

In the Second Series,
12 Q. B. D. 9 P. D.

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ADMINISTRATION — *Administration Action — Costs—Solicitor and Client—Residuary Legatee Plaintiff—Insufficient Estate.*] A residuary legatee plaintiff in an administration action is entitled to his costs as between solicitor and client where the estate is insufficient for payment of legacies, provided it is sufficient for payment of debts, but not otherwise. *In re* HARVEY. WRIGHT *v.* WOODS [179

2. —— *Tenant for Life and Remainderman—Settlement by Will of Share of Business—Apportionment of Loss.*] A trader devised and bequeathed to trustees all his real and personal estate, including his share in the business in which he was a partner, on trust as to one moiety thereof to pay the annual proceeds (including the net profits of the business) to his daughter for her life, for her separate use without power of anticipation, and after her death the moiety was to be held in trust for her children or remoter issue. He directed his trustees to carry on the business after his death until the expiration of the partnership term, and authorized them to use, not only such capital as he should have in the business at the time of his death, but also such other part of the trust premises as they should think fit. The partnership deed authorized the partners to dispose of their shares by will; it did not provide how any loss in carrying on the business should be borne. The will contained no provision as to the mode in which any such loss should be borne as between the persons interested in the testator's estate. It had been the practice of the firm in prosperous years to divide the whole profit among the partners, and in years in which there was a loss to write off each partner's proportion of the loss from his share of the capital. The testator died in 1879. After his death the business was carried on by his trustees in partnership with the other partners. Up to the end of 1880 it was carried on at a profit, and half the testator's share of that profit was paid by the trustees to the daughter. For the year 1881 there was a loss, and the testator's share of the loss was written off from his share of the capital in the books of the firm. For the year 1882 there was a profit:—*Held*, that the daughter was entitled to receive half that share of the profits which the testator, according to the practice of the firm, would have received if he had been alive, and that, consequently, she was entitled to receive half his share of the profits for the year 1882, without any deduction for the purpose of making good the *corpus* of the settled share in the interest of the remaindermen. GOW *v.* FORSTER - 672

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—— Will—Child of testator - - 266
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APPORTIONMENT — *Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35)—*Will come into operation before the Act—Death of Tenant for Life after the Act.*] A testator who died before the Apportionment Act, 1870, came into operation, gave the income of his residuary estate, which included railway, preference, and ordinary stock, to his wife for life, with remainder to his nephews. The widow claimed under the old law and received the entire dividends upon the railway stock which were declared and became receivable after the testator's death. On the death of the widow the residuary legatees claimed the whole of the railway dividends becoming payable after the death of the widow:—*Held*, that the executors of the widow were entitled, under the new law, to an apportioned part of the dividends up to her death. Lawrence *v.* Lawrence - - - 795

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BANKRUPTCY — *Act of Bankruptcy — Assignment of whole Property to secure existing Debt and further Advance—Statement of Consideration—Affidavit on Registration—Jurat—Omission of Commissioner's Title — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.] When a bill of sale of the whole of a trader's property is executed as security for an existing debt and a fresh advance, the true test whether the execution of the deed is an act of bankruptcy, is, Was the fresh advance made by the lender with the intention of enabling the borrower to continue his business, and had he reasonable grounds for believing that the advance would enable the borrower to do so? If these questions can be answered in the affirmative, the execution of the deed is not an act of bankruptcy. The Court ought not to look at the uncommunicated intention of the borrower, nor at the actual result of the loan. The consideration for a bill of sale is sufficiently stated, so as to satisfy the requirements of sect. 8 of the Bills of Sale Act, 1878, if it is stated with substantial accuracy—if the true legal or business effect of what actually took place is stated. Strict literal accuracy of statement is not necessary. The affidavit filed on the registration of a bill of sale was sworn before a commissioner to administer oaths, but in the jurat he merely signed his name, and did not add his title as commissioner:—*Held*, that, notwithstanding this omission, the affidavit was sufficient. *Ex parte* Johnson. *In re* Chapman - - C. A. 338

BANKRUPTCY—*continued.*

2. —— *Act of Bankruptcy—Fraudulent Conveyance—Assignment of all Debtor's Property—Intent to defeat or delay Creditors—13 Eliz. c.* 5—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2.] A trader in embarrassed circumstances in July, 1882, assigned substantially the whole of his property (including his stock-in-trade, book debts, and the goodwill of his business) to a single creditor, in consideration (as expressed in the deed) of the release by that creditor of a debt of £3271 then owing to him by the debtor. In fact, at the date of the assignment, only £1370 was due by the assignor to the assignee, and the real consideration was the release by the assignee of that debt, and a secret verbal agreement between him and the assignor that he should undertake the payment of the assignor's debts (either the whole of his debts, or, at any rate, his trade debts). On the same day the assignor entered into a written agreement to manage the business as the servant of the assignee at a weekly salary. The assignee, a few days before the execution of the deed, but after the arrangement between the parties had been come to, paid out some executions for the assignor, and shortly after the execution of the deed he paid an arrear of rent which the assignor owed to his landlord. The business was, after the execution of the deed, carried on by the assignor in his own name, just as it was before, there being nothing to shew that he was not the real, as well as the apparent, owner of it, though he was in fact acting under the directions of the assignee. None of the other creditors knew of the assignment. In March, 1883, the assignor was adjudged a bankrupt. At the date of the bankruptcy nearly all the trade debts due by the assignor at the date of the deed had been paid in the course of the carrying on of the business:—*Held*, by Cotton and Bowen, L.JJ., that the deed was void as against the trustee in the bankruptcy as an act of bankruptcy, its necessary effect being to defeat and delay the assignor's creditors in enforcing their ordinary remedies for the recovery of their debts, and their being no means by which they could compel the fulfilment by the assignee of his agreement to pay their debts:—*Held*, by Fry, L.J., that the deed was void as against the assignor's creditors under the statute 13 Eliz. c. 5:—*Held*, also, that the assignee was not entitled to payment in full out of the bankrupt's estate of the sums which he had paid under the agreement,

BANKRUPTCY—*continued.*

but that he could only prove for them in the bankruptcy. *Ex parte* CHAPLIN. *In re* SINCLAIR. [C. A. 319

3. —— *Fraud on Bankrupt Law—Shipbuilding Contract—Power for Buyer in the event of Bankruptcy of Builder to use Materials belonging to Builder in completion of Ship.*] A contract for the building of a ship provided that, if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without the same having been completed and ready for delivery, or in the event of the bankruptcy or insolvency of the builder, it should be lawful then and thenceforth for the buyer to cause the ship to be completed by any person he might see fit to employ, or to contract with some other person for the completion of the work agreed to be done by the builder, and to employ such materials belonging to the builder as should be then on his premises, and which should either have been intended to be, or be considered fit and applicable for the purpose:—*Held*, that, so far as this clause applied to the bankruptcy of the builder, it was void as against the trustee in his bankruptcy as being an attempt to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy, and as depriving the trustee of the right to elect whether he would complete the ship or not as might seem most advantageous for the creditors under the bankruptcy, and transferring that right of election to the buyer:—*Held*, also, that, this clause having been put in force by the buyer on the filing of a liquidation petition by the builder, the user of the builder's goods in the completion of the ship could not be justified on the ground of a subsequent cesser of work on the ship. *Ex parte* BARTER. *Ex parte* BLACK. *In re* WALKER - - - - C. A. 510

4. —— *Proof—Preferential Debt—Wages—Employer and Workman—Payment of Wages in Coin—Deductions to pay Doctor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 32—*Truck Act* (1 & 2 *Will.* 4, *c.* 37), *ss.* 1, 2, 3, 4, 23.] By an arrangement between employers and their workmen certain deductions were made from the workmen's wages (which were paid monthly) for a "doctor's fund," which was established for the purpose of paying a doctor, who attended the workmen and their families and supplied them with medicines in case of illness. The sums thus deducted were handed over by the employers to the doctor from time to time. There was no contract in writing between the employers and the workmen authorizing the employers to make the deductions, nor was there any evidence that the doctor had accepted the liability of the employers. The employers filed a liquidation petition, and at this time there stood to the credit of the "doctor's fund" in their books, a sum of £149, which had arisen from deductions thus made from the workmen's wages, and had not yet been paid over to the doctor:—*Held*, that there had been no valid payment (within the Truck Act) of the £149 to the workmen, and that they were entitled to be paid the £149 in full out of the employer's estate as unpaid wages.—

BANKRUPTCY—*continued.*

Whether, if the £149 had been, in pursuance of the arrangement, actually paid over by the employers to the doctor, in discharge of a debt for which the workmen were liable, or if the doctor had accepted the liability of the employers, the Truck Act would, notwithstanding the absence of a contract in writing signed by the workmen, have applied,—*Quære*. *Ex parte* COOPER. *In re* MORRIS - - - - C. A. 693

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BILL OF EXCHANGE—*Specific Appropriation—Marginal Advice—Property in Goods—Right to disposal of Proceeds—Principal and Agent.*] J. carried on business as a merchant at Liverpool under the firm of "S. J. & Co.," and also at Pernambuco in partnership with the Defendant C. under the firm of "J., P. & Co." Both firms employed B. as their agent in New York. The firm at Pernambuco were in the habit of receiving orders from persons there for the purchase of goods in New York. Upon receipt of these orders that firm instructed the Liverpool firm, who instructed B. B. then purchased the goods and shipped them to the Pernambuco firm, at the same time sending the bills of lading to that firm. To enable him to pay for the goods B. drew bills of exchange on the Liverpool firm and sold them in New York. The bills were not drawn for the precise amount of the shipments, but for round sums which were brought into the account current between B. and the Liverpool firm. B. advised the Liverpool firm of the bills, and with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft" and containing a memorandum of the date and amount of the bill and the name of the drawer with the words "Against shipments per" (naming the vessel). "Please protect the draft as advised above." The Liverpool firm, on the bills being presented to them for acceptance, detached the counterfoils and retained them in their own possession.—The Plaintiffs were the holders for value of three bills drawn by B. on the Liverpool firm in accordance with the above course of dealing, the goods purchased with the proceeds of the bills being shipped by B. to the Pernambuco firm, and the bills of lading being also sent to that firm.—On the 10th of June, 1879, the Liverpool firm stopped payment, and on the following day the goods arrived at Pernambuco, and were, with the bills of lading, delivered to the persons who had ordered them, the purchase-money being received by the Pernambuco firm.—The three bills of exchange being dishonoured by the Liverpool firm, the Plaintiffs brought an action against the Pernambuco firm claiming to have the bills paid out of the proceeds of the goods, on the ground that the latter had been specifically appropriated to meet the bills, but the Defendants claimed to

BILL OF EXCHANGE—*continued.*
retain the proceeds against a debt due to them from the Liverpool firm:—*Held*, that there had been no such specific appropriation, and action dismissed, but without costs.—*Ex parte Banner* (2 Ch. D. 278) considered. PHELPS, STOKES & Co. *v.* COMBER - - - - - - 755

BILL OF SALE—Statement of consideration 338
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BOND—*Immoral Consideration—Continuance of Cohabitation — Presumption.*] The testator six months before his death gave a bond to a lady with whom he had cohabited for more than thirty years, conditioned for the payment to her at the expiration of two years of a sum of money and interest; and he continued to cohabit with her until his death. There was nothing on the face of the bond with reference to the cohabitation, and there was no evidence that it was in fact given to secure the continuance of the cohabitation.—*Held*, that the mere continuance of the cohabitation was not enough to raise the presumption that the bond was given in consideration of future cohabitation, and accordingly that the bond was good.—Observations on *Gray* v. *Mathias* (5 Ves. 286). *In re* VALLANCE. VALLANCE *v.* BLAGDEN - - - - - - 353

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BUILDING SOCIETY—*Rules—Loan repayable by Instalments and Premiums—Interest on Premiums—Statutory Receipt*—37 & 38 *Vict. c.* 42, *s.* 42.] Under the rules of a building society which required that loans upon a mortgage should be repaid by annual instalments and premiums spread over a certain number of years, it was held that the society was justified in adding the whole of the annual premiums to the capital, and charging interest upon the combined amount; and upon the borrower redeeming before the end of the period, he was not entitled to a rebate in respect of the premiums contracted to be paid.—Where a borrowing member of a building society has mortgaged property to the society to secure advances and all payments due from him to the society, and the society on payment off of the mortgage indorses a statutory receipt under the 42nd section of the Building Societies Act, 1874, such receipt precludes them from questioning the sufficiency of the payment, and from making any further claim against the mortgagor in respect of the debt.—*Sparrow* v. *Farmer* (28 L. J. (Ch.) 537) distinguished. HARVEY *v.* MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY - C. A. 273

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—— *Foster, In re* (8 Ch. D. 598), dissented from
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—— *Freston, In re* (11 Q. B. D. 545), discussed
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—— *Gale, In re* (22 Ch. D. 820), considered 783
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—— *Garland, Ex parte* (10 Ves. 110), considered
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—— *Gray* v. *Mathias* (5 Ves. 286) observed upon
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—— *Mathews* v. *Paul* (3 Sw. 328) observed upon
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CHARITY—*Power of Sale — Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 24-26—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 38—*Allotments Extension Act*, 1882 (45 & 46 *Vict. c.* 80), *ss.* 4, 5, 11, 15—*Allotment Act* (2 *Wm.* 4, *c.* 42).] The Allotments Extension Act, 1882, has not taken away from the Charity Commissioners the power of authorizing a sale of charity lands vested in them under the Charitable Trusts Act, 1853, and the Charitable Trusts Amendment Act, 1855. PARISH OF SUTTON TO CHURCH - - - - 173

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COMPANY—*Fraudulent Agreement—Rescinding Fraudulent Agreement—Winding-up.*] B., for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit which they were to hold in trust for him. Some of the money having been drawn out with B.'s consent, and the company having been ordered to be wound up while a balance remained:—*Held* (affirming the decision of Bacon, V.C.), that B. could not claim to have the balance paid to him. *In re* GREAT BERLIN STEAMBOAT COMPANY - - - C. A. 616

2. —— *Memorandum and Articles of Association—Ultrà Vires—Liability of Directors—Acquiescence—Ratification.*] The objects of a company were stated by the memorandum of association to be "the carrying on for profit or gain the trades or businesses of discounters, lenders of, and dealers in money" . . . "the advancing and lending of money on real, personal, or mixed securities . . . on stocks and shares of railway, canal, dock, and other joint stock companies, corporations, associations, and other undertakings of whatever nature or description . . . on ships, goods, merchandize, materials, produce, works, plant, chattels, debts, choses in action, articles and effects, or on any other property of whatever kind and description . . . in the making of purchases, investments, sales, or any other dealings of or in any of the above-named articles or securities . . . and the entering into and carrying on of any monetary and financial arrangements or operations, and the doing of all matters and things which may appear to the company to be incident or conducive to the objects aforesaid, or any of them":—*Held*, that the entering into an agreement to purchase "on joint account" with two other parties, for £310,000, an estate, on which one of the other parties (K. & L.) undertook to finish a building (the Alexandra Palace), grounds, racecourse and stand, lodges, roads, terraces, and drainage, for a sum not exceeding £200,000, the company undertaking to float another (the Alexandra Palace) company for the purpose of acquiring materials and building the palace, was a transaction within the powers of the company:—*Held*, further, that such an agreement did not constitute a partnership between the three parties to it.—Observations on the effect of acquiescence by shareholders in the contracts and acts of their directors. LONDON FINANCIAL ASSOCIATION *v.* KELK - - - - - - 107

3. —— *Pledge of Shares—Blank Transfer.*] F., the registered holder of shares in a company, deposited the certificates with C. as security for £150, and gave him a transfer signed by F., with the consideration, the date, and the name of the transferee left in blank. C. deposited the certificates and the blank transfer with Q. as security for £250. C. died insolvent, after which Q. filled in his own name as transferee, and sent in the transfer for registration. The shares were accordingly registered in Q.'s name, but whether this was done before notice given by F. to the company and to Q. that F. denied the validity of the transfer, was doubtful on the evidence:—*Held*, affirming the decision of Fry, J., that Q. had no title against F. except to the extent of what was due from F. to C.—A person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument.—If a debtor delivers to his creditor a blank transfer by way of security,

COMPANY—*continued.*

that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract.—*Ex parte Sargent* (Law Rep. 17 Eq. 273) observed upon. France *v.* Clark - - - C. A. 257

4. —— *Transfer of Shares—Refusal of Company to register Transfer—Liquidation of Shareholder—Right of Trustee in Liquidation to be admitted on the Register.*] A trustee in liquidation of a shareholder who has transferred his shares by way of mortgage, but whose transfer has not been registered by the company on the ground of the shareholder being indebted to the company, has a right to be placed on the register of shareholders; subject, as to the shares, to all the equities that may subsist therein. *Ex parte* Harrison. *In re* Cannock and Rugeley Colliery Company - - - - 522

5. —— *Voluntary Winding-up—Special Resolution requiring Confirmation—Resolution appointing Liquidator—Notice of proposed Resolution—Necessity for—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 67, 133, *sub-s.* 2, 141.] A resolution appointing a liquidator is operative only when there is an effective resolution to wind up. —Where therefore a special resolution to wind up voluntarily which requires confirmation, has been passed at the first meeting, although it is unobjectionable to pass at the same meeting a resolution appointing a liquidator, the latter resolution by itself can have no effect; and if at the subsequent meeting the latter is rejected it is immaterial that the principal resolution, i.e., to wind up, has been confirmed—nor is it possible to fall back upon the resolution appointing a liquidator which was passed at the first meeting and treat it as binding.—The chairman of a general meeting has primâ facie authority to decide all incidental questions which arise at such meeting, and necessarily require decision at the time, and the entry by him in the minute book of the result of a poll, or of his decision of all such questions, although not conclusive, is primâ facie evidence of that result, or of the correctness of that decision, and the onus of displacing that evidence is thrown on those who impeach the entry.—Where the chairman at a confirmation meeting disallowed certain votes which had been given against the confirmation of a resolution passed at the first meeting appointing a liquidator, the effect of such disallowance being to confirm such resolution, and he made an entry in the minute book that such resolution had been confirmed, the Court in the absence of evidence that the votes were improperly disallowed, declined to question the decision of the chairman. But, having regard to the unsatisfactory state of the evidence, the Court of Appeal in the interest of all parties by its own order confirmed the appointment of the liquidator. *In re* Indian Zoedone Company [C. A. 70

6. —— *Winding-up — Running Contract — Charge on Moneys payable under the Contract—Winding-up of contracting Company — Set-off — Salvage Money—Moneys payable under concurrent Contracts—Notice.*] By the terms of a contract between the Commissioners of Sewers and a wood paving company, the company were to pave a particular street, and the Commissioners were to pay 60 per cent. of the moneys due a month after the engineer certified the works to be complete; 30 per cent. within three months afterwards; and 10 per cent. at the expiration of two years. During the two years the company were to keep the wood surface of the roadway in repair, and if, before the expiration of the two years, the Commissioners should give them notice, the company were also to keep the roadway in repair for fifteen years upon being paid for the same at the annual rate of 6*d.* per square yard. The Commissioners were to be at liberty to retain from time to time, "out of any money payable by them to the contractors, an amount equal to the above annual charge, by way of security; and in the event of failure by the company to perform the contract, the moneys retained were to be forfeited, and to be held by the Commissioners as liquidated damages for the default; and it was provided that whenever "according to the terms of this contract," any money should be due from the company to the Commissioners for damages or otherwise, the Commissioners might either sue for such money or deduct or set off the same against any money due from them to the company.—The contract being dated on the 22nd of September, 1882, the company, on the 15th of November, 1882, gave to L. & C., timber-merchants, a charge on all their interest in the contract to secure a debt for goods sold and delivered; and on the 9th of December, 1882, notice of this charge was given to the Commissioners.—On the same 9th of December, 1882, but after the notice, the company presented a petition for a winding-up order, and on the 12th and 16th of December the provisional official liquidator was empowered and ordered to complete the contract and to obtain the necessary timber on security of the moneys to be received subject to L. & C.'s charge. On the 13th of January, 1883, the winding-up order was made: on the 29th of January the liquidator, having completed the work, sent in a claim to the Commissioners, and on the 8th of March, 1883, the engineer certified the work to be complete. On the 19th of March, 1883, the Commissioners sent to the liquidator the engineer's certificate and a claim of set-off for anticipated loss by breach of the contract to repair for fifteen years, the amount of such claim being estimated by the difference between 1*s.* a square yard, which the Commissioners considered they would have to pay for the repairs, and the 6*d.* a square yard provided for by the agreement. They also claimed to set off damages accrued and anticipated under other contracts for paving other streets. Except as to a trifling sum, it was not alleged that any cause of action for breach of any of these contracts accrued before the 27th of January, 1883. On the 25th of May, 1883, the Commissioners served the company (in liquidation) with formal notice to repair for fifteen years from the 8th of March, 1885.—*Held,* that the liquidator was entitled to a first charge on the moneys payable under the contract for the cost of completing the work incurred by him since the winding-up: —*Held,* further, that the chargees, L. & C., were entitled to a charge on 90 per cent. of the moneys payable under the contract (subject as above) undimin-

COMPANY—*continued.*
ished by any retainer or set-off by the Commissioners either under the Victoria Street contract or otherwise: *Held*, further, that the Commissioners were entitled to retain the 10 per cent. pursuant to their contract and might prove for their cross-claim under the contract of the 22nd of September, 1882: *Held*, further, that the Commissioners were not entitled to retain any moneys due under the contract of the 22nd of September, 1882, in respect of moneys due under any of the concurrent contracts: *Held*, further, that the winding-up did away with the necessity of giving the notice to repair for fifteen years required by the contract. *In re* Asphaltic Wood Pavement Company. Lee & Chapman's Case - 624

7. —— *Winding-up — Unregistered Company —Tramway Company—"Railway Company"— Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.] An unregistered tramway company incorporated by a special Act does not fall within the exception of "railway companies incorporated by Act of Parliament" in sect. 199 of the Companies Act, 1862, and it may therefore be wound up under that section. *In re* Brentford and Isleworth Tramways Company - - 527

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COPYRIGHT—*Lecture in Manuscript delivered from Memory—Audience admitted by Tickets—Notes taken by Shorthand Writer—Publication of Lecture in "Phonographic Lecturer"—Implied Contract — Injunction.*] N., an author and a lecturer upon various scientific subjects, delivered from memory, though it was in manuscript, a lecture at the Working Men's College upon "The Dog as the Friend of Man." The audience were admitted to the room by tickets issued gratuitously by the committee of the college. P., the author of a system of shorthand writing, and the publisher of works intended for instruction in the art of shorthand writing, attended the lecture, and took notes, nearly verbatim, in shorthand of it, and afterwards published the lecture in his monthly periodical "The Phonographic Lecturer."—On motion for an injunction to restrain the publication;—*Held*, that where a lecture of this kind is delivered to an audience, limited and admitted by tickets, the understanding between the lecturer and the audience is that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes for their own personal purposes, but they are not at liberty to use them afterwards for the purpose of publishing the lecture for profit; and the publication of the lecture in shorthand characters is not regarded as being different in any material sense from any other; and injunction accordingly.—*Abernethy* v. *Hutchinson* (3 L. J. (Ch.) (O.S.) 209; 1 H. & T. 28) discussed. Nicols *v.* Pitman - - - - 374

2. —— *Words for use in Telegraphy—Copyright—Telegraphic Code compiled from the Words for use of Agents—Infringement of Copyright—Injunction.*] The Plaintiff published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, and it was accompanied by figure cyphers for reference or private interpretation. The book was registered under the Copyright Act, 5 & 6 Vict. c. 45. The Defendants bought a copy of the book, and compiled for their own use with its aid a new and independent work, as alleged, which was their own private telegraph code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their book for sale or exportation: — *Held*, that the Defendants had infringed the copyright of the Plaintiff, and that a perpetual injunction must be granted. Ager *v.* Peninsular and Oriental Steam Navigation Company - - 637

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DEFAMATION — *Injunction — Oral Slander — Mandatory Injunction—Letters addressed to Agent at the Principal's Office.*] B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. After his dismissal he went about among the customers, making oral statements reflecting on the solvency of L., and advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements to the customers or any other person or persons that L. was about to stop payment, or was in difficulties or insolvent, and from in any manner slandering L. or injuring his reputation or business, and from giving notice to the post-office to forward to B.'s residence letters addresled to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—*Held*, by Pearson, J., and the Court of Appeal, that the Court has jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, and that this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statements; and that in the present case an injunction ought to be granted:—*Held*, also, by Pearson, J., and by the Court of Appeal, that the Defendant had no right to give a notice to the post-office the effect of which would be to hand over to him, letters of which it was probable that the greater part related only to L.'s business; and that the case was one in which a mandatory injunction compelling the Defendant to withdraw his notice could properly be made, the Plaintiff being put under an undertaking only to open the letters at certain specified times, with liberty for the Defendant to be present at the opening. Hermann Loog *v.* Bean - - C. A. 305

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HUSBAND AND WIFE—*Policy of Life Assurance for benefit of Wife and Children of Assured—Petition for Appointment of Trustees—Title of Petition—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 11, 22.] A petition (presented since the coming into operation of the Married Women's Property Act, 1882), for the appointment of trustees of the proceeds of a life policy effected by a husband, under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the Act of 1882. *In re* SOUTAR'S POLICY TRUST - - - 236
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INFANT—*Maintenance—Guardian and Ward—Voucher of Items of Expenditure.*] H. and C. were trustees and executors of a will, and guardians of the testator's daughters. The daughters during their infancy were maintained by C., and H. allowed him to receive the income for that purpose. After they attained majority judgment was given for administration of the testator's estate, in which the usual accounts of the personal estate were directed, and an inquiry how and by whom each of the daughters was maintained during infancy, and what was proper to be allowed and to whom out of the income of her share for her maintenance and education. A dispute having arisen in taking the accounts and inquiry, H. applied for a declaration that the receipts by C. of the income of the shares of the daughters for maintenance were a good discharge to H., and that H. was not to be called upon to produce vouchers in respect of the particular manner in which the income was applied. Kay, J., made an order expressing the opinion of the Court that the accounts of the trustees should be taken as directed by the judgment as between guardian and ward, and ordering H. to pay the costs of the application:—*Held*, on appeal, that H., as trustee, was not discharged by mere evidence of payment of the income to C., his co-guardian, but that under the inquiry H. was not bound to vouch the items of expenditure; and if it was shewn that C. had properly maintained and educated the children, the sum proper for that purpose would be allowed against the balance found due on the account, without vouching the details of the application. *In re* EVANS. WELCH *v.* CHANNELL - - - - C. A. 58

2. —— *Maintenance — Contingent Interest under Will—Directions for Accumulation of Income until happening of Contingency—"Contrary Intention"—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] A testator gave a fund to trustees, on trust for all the children of A. equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with benefit of survivorship amongst them, and he directed his trustees to accumulate the income of the shares of the children, and to pay the same to them as and when their presumptive shares should become payable under the previous trust:—*Held*, that the will did not express a "contrary intention" within the meaning of sect. 43 of the Conveyancing Act, 1881, and that, the children being infants and unmarried, the trustees might at their discretion apply the income of the trust fund in or towards the maintenance and education of the infants. *In re* THATCHER'S TRUSTS - - - - 426

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LANDLORD AND TENANT—*Ground Game Act, 1880 (43 & 44 Vict. c. 47)—Agreement for Lease.*] When at the date of the passing of the Ground Game Act, 1880, land is in the occupation of a tenant with a legal interest, as tenant from year to year, expiring after the commencement of the Act, but also with an equitable interest under an agreement prior to the Act for a lease for fourteen years to commence from the expiration of the legal interest, and reserving to the landlord the right to the ground game on the land, such right in the landlord as against the tenant is preserved by the provisions of the saving clause of the Act (sect. 5): the phrase "is vested" not being confined to an actual legal vesting under a lease in possession, but including an equitable vesting of the right under an agreement for a lease, contract of tenancy, or other contract bonâ fide made for valuable consideration. ALLHUSEN *v.* BROOKING - - - - - 559
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LIGHT—*Easement—Obstruction—Injunction or Damages—Discretion of Court—Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2.*] In exercising the discretion given by sect. 2 of Lord Cairns' Act, to award damages in substitution for an injunction, in the case of a substantial interference with a plaintiff's ancient lights, the Court will not, when the result of the defendant's buildings would be, if they were allowed to continue, to render the plaintiff's property absolutely useless to him, compel the plaintiff to sell his property out and out to the defendant. But, if the injury to the plaintiff will be less serious, and his property will remain substantially useful to him, if the defendant's buildings are permitted to continue, the Court may exercise its discretion by awarding the plaintiff damages in lieu of an injunction, and for the purpose of exercising that discretion the Court will take into consideration the nature and situation of the property, e.g. the circumstance that it is situate in the centre of a large city, such as London.—*Aynsley* v. *Glover* (Law Rep. 18 Eq. 544), *Krehl* v. *Burrell* (7 Ch. D. 551), and *Smith* v. *Smith* (Law Rep. 20 Eq. 500), considered. HOLLAND *v.* WORLEY - - - - 578
LIMITATIONS, STATUTE OF—21 *Jac.* 1, *c.* 16, *s.* 3—*Acknowledgment.*] J. H. was a trustee of a settlement by which the T. B. estate was settled on the wife of the Defendant for life to her separate use without power of anticipation. J. H. lent money to the Defendant, and for some time, with the wife's consent, the rents of the T. B. estate were applied towards payment of the debt, the wife giving receipts for them. In October, 1879, the Defendant wrote to J. H., "I thank you for your very kind intention to give up the rent of T. B. next Christmas, but I am happy to say at that time both principal and interest will have been paid in full."—*Held*, that this was an acknowledgment which would take the debt out of the Statute of Limitations.—Decision of Mr. Baron Pollock reversed. GREEN *v.* HUMPHREYS C. A. 474

2. —— *Mortgage—Executor of Mortgagor—Devastavit.*] A testator mortgaged leaseholds and died. His executors took possession of his estate, recovered the rents of the leaseholds, paid

LIMITATIONS, STATUTE OF—*continued.*
the interest on the mortgage, and, without providing for the mortgage debt, made certain payments to the beneficiaries under the will.—In the course of proceedings by the mortgagee for the realization of his security and by a legatee for administration, the executor carried in an account in which he claimed credit for all payments made to the beneficiaries on the ground that under the circumstances the mortgagee must be taken to have acquiesced in such payments, and further that as to such of the said payments as were made upwards of six years before the action any claim on a devastavit was barred after six years by the Statute of Limitations:—*Held*, that there was no sufficient proof of acquiescence, and that the executors having acknowledged the mortgage debt by payment of interest, and being bound in equity by a trust properly to deal with the assets, could not set up their own wrong by way of devastavit as a defence in order to claim the benefit of the Statute of Limitations.—*In re Gale* (22 Ch. D. 820) considered. *In re* Marsden. Bowden *v.* Layland. Gibbs *v.* Layland 783

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——, 1883, rr. 61, 62 - - - - 496
See Lunatic.

LUNATIC—*Property of Small Amount—Petition for Application of Income—Opposition by alleged Lunatic—Jurisdiction — Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *s.* 12—*General Orders in Lunacy, Nov.* 1862, *rr.* 7, 8—*Lunacy Orders*, 1883, *rr.* 61, 62.] The power given to the Lord Chancellor by s. 12 of the Lunacy Regulation Act, 1862 (extended by s. 3 of the Lunacy Regulation Amendment Act, 1882), to make an order for the application of the property of a person of unsound mind for his maintenance or benefit, when the property is below a specified amount, without directing any inquiry under a commission of lunacy, ought not, even if the jurisdiction extends in cases in which the alleged lunatic appears and denies unsoundness of mind, to be exercised in such cases. *In re* Lees C. A. 496

—— Vesting order—Trustee Act - - 745
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MAINTENANCE—Infant - - - 58, 426
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MARRIED WOMAN—Consent—Settled Estates Act - - - - - 220
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MASTER OF THE ROLLS—Jurisdiction - 105
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MEMORANDUM AND ARTICLES - - 107
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MISJOINDER—Solicitor's—Discovery and costs
See Practice. 8. [35

MORTGAGE—*Consolidation — Voluntary Settlement by Mortgagor — Subsequent Mortgages by same Mortgagor of the settled and also of other Property—Sale by First Mortgagee under Power—Title to surplus Sale Moneys.*] A. B. having executed a voluntary settlement of the W. estate mortgaged it in fee to X. Y. He afterwards mortgaged the Q. estate, and that mortgage became vested in X. Y.:—*Held*, that X. Y. was not entitled to consolidate as against the persons claiming under the voluntary settlement the mortgages on the W. and Q. estates.—A. B. having mortgaged estates in fee simple, subsequently made a voluntary settlement of the same estates and all his interest therein to grantees to uses to hold, subject to the mortgage and to a power of raising a sum of money for himself, to the use of himself for life with remainder to his first and other sons in tail, with remainders over. —The mortgagee afterwards sold the estates under the power of sale in the mortgage, and after retainer of his debt and costs paid the balance of the sale moneys into Court under the Trustee Relief Act. Upon a petition for payment out A. B. contended that the sale had destroyed the voluntary settlement, and that the persons claiming thereunder had no equity against the sale moneys, which must be treated as if the sale had been made by A. B. himself:—*Held*, that the voluntary settlement was a complete disposition by the settlor of the proceeds of the sale of the estate in case the prior mortgagee should exercise his power, and that the volunteers under the settlement were entitled as against the settlor to the fund in Court. *In re* Walhampton Estate [391

2. —— *Priority—Fund partly in Court and partly in Hands of Trustees—Notice—Stop Order —Practice—Foreclosure Action—Several Defendants—Time for Redemption.*] When an assignment is made of an interest in a trust fund part of which is in Court and part in the hands of the trustees, the assignee in order to complete his title must, as regards the fund in Court, obtain a stop order, and, as regards the fund in the hands of the trustees, give notice to the trustees. Notice to the trustees will be ineffectual as regards the fund in Court, and as to that fund the priorities of different assignees will be determined by the dates at which they have obtained stop orders. An assignee who has obtained a stop order is entitled (as regards the fund in Court) to priority over a prior assignee (of whose assignment he had no notice), who had given notice to the trustees before the date of the stop order, but who had not himself obtained any stop order.—As a general but not invariable rule, when there are several defendants to a foreclosure action, one period for redemption should be allowed to all the defendants. Mutual Life Assurance Society *v.* Langley - - - - - 686

3. —— *Priority — Negligence of First Mortgagee in custody of Deeds.*] C., the manager of a joint stock company, executed a legal mortgage to the company of his own freehold estate, and

MORTGAGE—*continued.*

handed over the title deeds to them. The deeds were placed in a safe of the company, which had only one lock having duplicate keys, one of which was intrusted to C., as manager. Some time afterwards, C. took out of the safe the deeds except the mortgage, and handed them to W., to whom at the same time he executed a mortgage for money advanced to him by her, without notice of the company's security:—*Held*, reversing the decision of the Vice-Chancellor of the Court of the County Palatine of Lancaster, that the mortgage of the company had priority over the mortgage to W.—The Court will postpone a legal mortgage to a subsequent equitable security: (1) where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence where such conduct cannot otherwise be explained; or (2), where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate.—But the Court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee. Northern Counties of England Fire Insurance Company *v.* Whipp **C. A. 482**

4. —— *Redemption—Right of Mortgagor to call for Assignment to any third Person—"On the terms"—Tenant for Life—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 15.] A tenant for life of mortgaged premises who has failed to keep down the interest and who has obtained the usual order permitting him to redeem the mortgage, is not of right entitled under sect. 15 of the Conveyancing and Law of Property Act, 1881, to require the mortgagee to transfer the mortgage debt and premises to a third person. Alderson *v.* Elgey - - - - **567**

—— Building society—Repayment—Statutory receipt - - - - **273**
See Building Society.

—— Statute of Limitations - - - **783**
See Limitations, Statute of. 2.

NAME CLAUSE - - - - **792**
See Will. 1.

NEGLIGENCE—Mortgage—Priority - **482**
See Mortgage. 3.

—— Solicitor's bill of costs—Taxation - **459**
See Solicitor. 3.

NEW TRUSTEES—Appointment of—Petition
See Husband and Wife. [**236**

—— Refusal of executor of trustee to appoint **82**
See Trustee. 2.

NON-USER—Trade-mark - - - **288**
See Trade-mark. 2.

NOTICE—Repair of road—Winding-up of company - - - - - **624**
See Company. 6.

—— Third party - - - **161, 529**
See Practice. 15, 16.

NOTICE—*continued.*

—— Trustees—Charge on fund - - **686**
See Mortgage. 2.

—— Vendor's lien—Register county - **501**
See Vendor and Purchaser.

OPINION OF COUNSEL—Privilege - **678**
See Practice. 12.

PAINTINGS—Gift of—Heirlooms - - **538**
See Will. 6.

PARTNERSHIP—Business carried on by trustees of deceased partner—Apportionment of loss - - - - - **672**
See Administration. 2.

PATENT—*Infringement—User—Non-destruction of infringing Machines.*] Defendants, a telephone company, contracted with an American agent for the purchase of a number of telephones. These machines, known as Blake transmitters, having been accordingly made in America, were sent to this country, and came into the possession of the Defendants, who kept them unused in a warehouse. The Blake transmitters were protected by English and American patents. The Plaintiffs, another telephone company, having in the meantime obtained an assignment of Blake's English patent, brought an action for infringement, claiming an injunction and delivery up of the machines. Defendants dismantled the machines by taking out the Blake elements, and kept the separate parts stored in a warehouse:—*Held*, that the possession of the machines by the Defendants was an infringement of the Plaintiffs' patent rights; and injunction granted.—The Court refused to order the destruction or the delivery up of the infringing machines. United Telephone Company *v.* London and Globe Telephone and Maintenance Company **766**

2. —— *Specification—Clerical Error—Amendment—Jurisdiction of the Master of the Rolls—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 18.] The 18th section of the Patents, Designs, and Trade-marks Act, 1883, does not affect the jurisdiction of the Master of the Rolls to allow an amendment in a patent specification which has been filed under sects. 27 and 28 of the Patent Law Amendment Act of 1852, or has otherwise become a record. So long as it is in the Patent Office, and before the patent is sealed, any one applying for amendment must proceed under sect. 18 of the Act of 1883. *In re* Gare's Patent - - **105**

3. —— *Validity—Estoppel—Particulars of Objection*—15 & 16 *Vict. c.* 83, *s.* 41.] In 1873 letters patent for improvements in lace machines were granted to H., who in 1877 went into liquidation, and the patent was sold by the trustee to the Plaintiffs. H. afterwards entered into partnership with S., and this action was brought against S. & H. to restrain them from infringing the patent. By an order made when the action had come on for trial, it was postponed, with liberty to S. & H. to deliver specified objections. These were that S. & H. denied infringement, and that S. objected to the validity of the patent on the ground of want of novelty

PATENT—*continued.*
and insufficiency of the specification. From the cross-examination of the Plaintiffs' witnesses it appeared that one of the subsidiary combinations in the machine was not novel. The Court of first instance was of opinion that the patentee had not claimed this subsidiary combination as his invention, held the patent valid, and granted an injunction against both Defendants, and an inquiry as to damages. The Defendants appealed. The Court of Appeal held that on the construction of the specification H. had claimed the subsidiary combination as his invention, and that the patent was invalid, and that there being nothing to prevent S. from insisting on this objection, his appeal must succeed:—*Held*, that H. was not estopped from disputing the validity of the patent, either by matter of record, on the ground that the letters patent were of record; or by deed, by reason of the specification being under his seal; or by matter in pais, on the ground of the statements in his petition to the Crown, there being nothing to shew that the plaintiffs bought on the faith of those statements. —But, *held*, that as H. had not delivered objections to the validity of the patent, evidence to shew that it was invalid for want of novelty could not be read on his behalf:—*Held*, also, by Cotton and Fry, L.JJ. (dissentiente, Bowen, L.J), that as H. had never asked for leave to amend his particulars of objection, but had to the last argued the case on the ground that no such amendment was necessary, leave ought not to be now given, but that his appeal must be dismissed. CROPPER *v.* SMITH - - C. A. 700

PERSON AGGRIEVED—Registration of trade-mark - - - - - 48
See TRADE-MARK. 3.

PLEADING—Embarrassing—Action on covenant in lease - - - - 778
See PRACTICE. 14.

PLEDGE—Shares—Blank transfer - - 257
See COMPANY. 3.

POLICY—Life insurance—Married woman—Petition - - - - - 236
See HUSBAND AND WIFE.

POLLUTION—Underground water - - 194
See WATER.

PORTIONS - - - - - 363
See SETTLEMENT. 1.

POSSESSION MONEY - - - 605
See SHERIFF.

POWER—*Settlement—Appointment — Donee unaware of Power—Exercise of Power—Election—Approbation and Reprobation.*] A married woman being (although unaware of it) the donee of a general power of appointment by deed or will over policy moneys payable upon her own death, concurred with her husband in settling certain family estates by an indenture which treated the policy moneys as the husband's own property, and settled them also. Her concurrence in the settlement was for a purpose entirely unconnected with the policy moneys, and under it she took a life interest in remainder after her husband's death in the estates, but no interest in the policy moneys. She survived her husband, received in respect of her life interest in the estates sums

POWER—*continued.*
exceeding the amount of the policy moneys, and died, having by her will given all property over which she had any disposing power to certain beneficiaries:—*Held*, that by her will she had exercised her general power so as to make the policy moneys her own assets, and *Held* also, that having taken under the settlement, benefits exceeding the value of the policy moneys, she could not by the exercise of her power take the policy moneys out of the settlement, without making good to the settlement beneficiaries an equal amount from her own estate; and accordingly that the policy moneys must be paid to the settlement trustees. —*Semble*, The concurrence of the donee of the power in the deed of settlement, for purposes unconnected with the policy moneys subject to the power, and in ignorance of the existence of the power, could not operate as an exercise of the power although the deed purported to pass the policy moneys. GRIFFITH-BOSCAWEN *v.* SCOTT 358

2. —— *Settlement — Power to appoint New Trustees—Alienation of his Interest by Donee of Power—Subsequent Exercise of Power—Consent of Alienees.*] A power to appoint new trustees may be exercised by a tenant for life after aliening his interest. By a settlement, property partly real and partly personal, was conveyed to trustees upon trust to provide an annuity for A., a widow, for life, and subject thereto for B., her son, absolutely. The settlement provided that B., during his life, and after his death the trustees or trustee for the time being, or the executors or administrators of the last acting trustee, should have power to appoint new trustees, if necessary. B. mortgaged his whole interest under the settlement, and the real estate (subject to A.'s annuity) was sold by the mortgagees to C. The personal estate was not sold by the mortgagees:—*Held*, that B. could still exercise the power to appoint new trustees, without the consent of C. HARDAKER *v.* MOORHOUSE - - - - 417

—— Appointment—Invalidity—Election 208
See SETTLEMENT. 3.

—— Appointment—Will—Child of testator 266
See WILL. 8.

—— Of sale—Charity Commissioners - 173
See CHARITY.

—— Of sale—Settled Land Act - - 736
See SETTLED LAND ACT. 1.

—— Of sale—Will—Conversion - - 601
See WILL. 4.

PRACTICE—*Appeal—Time for Appeal—Refusal of Application—Special Direction as to Costs—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15.] Where an application to a Judge is refused, and the Judge adds special directions as to the payment of the costs, that is a refusal of the application within the meaning of Order LVIII., rule 15, and the time for appeal runs from the date of the refusal not from the drawing up of the order. *In re* SMITH. HOOPER *v.* SMITH - - C. A. 614

2. —— *Attachment—Delivery up of Deeds—Non-compliance with Order for—Contempt—Writ of Attachment — Sheriff — Execution of Writ—Breaking open Outer Door.*] Where a writ of attachment has issued against a party to an action for contempt of Court in non-compliance with an

PRACTICE—*continued.*

order for the delivery over of deeds and documents, the officer charged with the execution of the writ may break open the outer door of the house in order to execute it.—*Burdett* v. *Abbott* (14 East, 1) and *In re Freston* (11 Q. B. D. 545) discussed. Harvey *v.* Harvey - - **644**

3. —— *Attachment—Order for Production of Documents—Service on Solicitor—Indorsement on Order—Rules of Supreme Court*, 1883, *Order* xxxi., *rr.* 21, 22, 23; *Order* xli., *r.* 5; *Order* lii., *r.* 4.] Order xli., rule 5, which requires every order to bear an indorsement warning the party bound by it of the consequences of disobedience, applies to an order for discovery of documents of which service on the solicitor is permitted. And a writ of attachment cannot be issued against a person who disobeys such an order unless the copy served on his solicitor bore the required indorsement.—A party whose solicitor was served with such an order without the required indorsement took out a summons for further time:—*Held* (dissentiente Lindley, L.J.), that he did not thereby waive the irregularity of the service.—The decision of Chitty, J., reversed.—The affidavit in support of a motion for attachment was not served with the notice of motion as it ought to have been under Order lii., rule 4, but was served two clear days before the day named in the notice of motion for moving the Court:—*Held*, by Chitty, J., that this was not such an irregularity as made the notice invalid. Hampden *v.* Wallis - - **746**

4. ——*Change of Parties—Rules of Supreme Court*, 1883, *Order* xvii. *rr.* 4, 5—*Infant—Carrying on Proceedings—Supplemental Action—Form of Order.*] Where proceedings have been taken in an action after it has become defective by the birth of an infant who is a necessary party thereto, the infant should be made a party by the common order under Rules of Supreme Court, 1883, Order xvii., rule 4, to carry on proceedings between the continuing parties and such infant; and the order (as in Seton (page 1527, Form 3)) should go on to direct an inquiry whether any proceedings affecting the interest of the infant have been taken in the action since his birth, and if so, whether it will be fit and proper and for the benefit of the infant that he should be bound thereby; and if so certified the infant to be bound accordingly.—If such inquiry be answered in the negative, the plaintiff or person having the conduct can still proceed by supplemental action. Peter *v.* Thomas-Peter - - **181**

5. —— *Consent Order—Facts not mentioned to Court—Withdrawal of Consent.*] An action was brought against a local board to restrain them from pulling down certain houses of the Plaintiff's, and for damages. On a motion for an injunction coming on, the Defendants' counsel by the authority of his clients, consented to an order for a perpetual injunction, with costs, and an inquiry as to damages, and such order was taken by consent without opening the case to the Court. Before the order had been passed, the Defendants formally withdrew their consent, and the Registrar thereupon declined to pass the order without the direction of the Court. The Plaintiff moved that he might be directed to proceed to perfect the order. The Defendants alleged

PRACTICE—*continued.*

that their instructions to consent had been given under a misapprehension, but did not enter into any evidence in support of that allegation:—*Held* by Pearson, J., that up to the time of a consent order being passed, any party can withdraw his consent, except where he consents to a decree of the Court after the case has been before the Judge, and that the application must be refused:—*Held*, on appeal, that where counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, and that the Registrar must be directed to proceed to perfect the order, without prejudice to any application which the Defendants might make to the Court below to be relieved from their consent, on the ground of mistake or surprise or for other sufficient reason. Harvey *v.* Croydon Union Rural Sanitary Authority **[C. A. 249**

6. —— *Costs of Executor of defaulting Executor—Defendant appearing in two Capacities—Apportionment of Costs.*] Where an action was brought for the administration of a testator's estate against the executor of a defaulting executor, whose estate was insolvent:—*Held*, that the Defendant being before the Court in a double capacity should have his costs of taking the accounts of the original testator's estate and half the rest of the costs of the action out of the estate.—*Palmer* v. *Jones* (43 L. J. (Ch.) 349) and *Kitto* v. *Luke* (28 W. R. 411) followed. *In re* Griffiths. Griffiths *v.* Lewis - **C. A. 465**

7. —— *Default of Pleading—Defence delivered after Time—Rules of Court*, 1875, *Order* xxix., *rr.* 10, 14—*Rules of Supreme Court*, 1883, *Order* xxvii., *rr.* 11, 15.] S. gave to G. a charge upon costs due from B. to S. G. brought his action against S. and B., asking for an account and foreclosure against S., and that B. might be ordered to pay the amount of the bill of costs, £359, into Court. The time for delivering defence was enlarged from the 1st of August to the 16th of August, 1882. No defence having been delivered, notice of motion for judgment was served on the 18th of November. On the 2nd of December B. took out a summons for leave to deliver defence, which was dismissed on the 6th. The defence which he proposed to put in alleged that there were other dealings between B. and S., and that no substantial part of the bill of costs was due, and moreover that B. was going to have the bill taxed. On the 19th of February, 1883, the motion for judgment came on for hearing. The Court refused to look at the defence, and gave a judgment directing an account against S., and ordering B. to bring the £359 into Court. B. appealed.—*Held*, that on motion for judgment for want of defence, if a defence has been put in, though irregularly, the Court will not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done; and that in the present case the order for bringing the £359 into Court must be discharged, and an account directed of what was due from B. to S. in respect of the bill of costs. Gibbings *v.* Strong - - **C. A. 66**

8. —— *Demurrer—Frivolous Action—Misjoin-*

PRACTICE—*continued.*

der—Dismissal of Action—Rules of Supreme Court, 1883, *Order* XXV., *rr.* 1, 3, 4—*Joinder of Solicitors for Purposes of Discovery or Costs—Order* XVIII., *r.* 1.] Order XXV. of the Rules of 1883, although in form abolishing demurrers, has merely substituted other modes of procedure by which the objects of a demurrer, so far as it served a beneficial purpose in obtaining a speedy decision of the point at issue, can now be attained. Where the cause of action against one defendant is totally disconnected with that against the other defendant, except so far as it arises out of an incident in the same transaction, there is a misjoinder, and it is not the case contemplated by Order XVIII., rule 1. Solicitors who were made parties with other defendants to an action, the statement of claim in which shewed no reasonable cause of action as against them:—*Held*, entitled under Order XXV., rule 4, to an order dismissing the action as against them with costs and striking their names out of the proceedings. To make solicitors or others parties to an action without seeking any relief against them, except payment of costs or discovery, is vexatious. BURSTALL *v.* BEYFUS - - - C. A. 35

9. —— *Evidence de bene esse—Witness above seventy years of age—Affidavit—Sufficiency of—Rules of the Supreme Court*, 1883, *Order* XXXVII., *rr.* 1–5; *Order* XXXVIII., *r.* 3.] The Court has jurisdiction on a proper occasion when it is "necessary for the purpose of justice," to make an order for an examination de bene esse of witnesses upon an ex parte application, the order being taken by the applicant at his peril, and subject to the risk of being discharged on sufficient grounds. An order was made in Chambers on an ex parte application by the Plaintiffs to examine de bene esse thirty witnesses upon an affidavit of the Plaintiffs' solicitor merely stating that he was advised that they were material witnesses—that they were all above seventy years of age, and that he was advised and believed that by reason of their age it was desirable that their examination should be taken without delay. This order was discharged by Kay, J., on motion in Court, mainly on the ground that the affidavit was insufficient. *Held*, by the Court of Appeal (affirming Kay, J.), that the affidavit did not satisfy the requirements of Order XXXVIII., r. 3, but leave was given to put in a further affidavit stating what information had been obtained, and what steps had been taken to obtain such information as to the age of the different witnesses, and also stating generally the facts which the particular witnesses were going to depose to. Although the fact that a witness is seventy years old is generally a good primâ facie ground for an order for his examination de bene esse, such a practice will not necessarily be applied to an extraordinary case, e.g., where an order has been made to examine thirty witnesses. On a subsequent application made on a further affidavit of the solicitor, in which he divided the witnesses into four classes who were to depose to four different heads of evidence:—The Court declined to allow the examination de bene esse of ten of the proposed witnesses who were between seventy and seventy-five years old, without prejudice to a

PRACTICE—*continued.*

subsequent application for leave to examine them on grounds other than age, but allowed the other twenty witnesses above seventy-five to be examined de bene esse upon the undertaking of the Plaintiffs' counsel to produce at the trial, if so requested by the Defendant, any of such witnesses who might be then alive. BIDDER *v.* BRIDGES [C. A. 1

10. —— *Production of Documents—Discovery—Rules of Supreme Court*, 1883, *Order* XIX., *r.* 6; *Order* XXXI., *rr.* 12, 20—*Opening Settled Account—Allegations of Fraud.*] The Plaintiffs employed the Defendants to purchase goods, as their agents, at the lowest possible prices. The Plaintiffs sued for an account, and in their statement of claim alleged that the Defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. The charges against the Defendants were stated in general terms, no particulars being mentioned. The Defendants denied the charges, and pleaded a settled account. The Plaintiffs applied for production of documents:—*Held*, by Cotton, L.J., affirming the decision of Bacon, V.C., (dissentiente, Fry, L.J.) that the Plaintiffs were not bound to give particulars of fraud under Order XIX., rule 6, before obtaining discovery of documents:—*Held*, by Fry, L.J., that the allegations of fraud in the pleadings not being sufficient to enable the Plaintiffs to open a settled account, discovery ought to be refused until the allegations had been made sufficient. WHYTE *v.* AHRENS - C. A. 717

11. —— *Production of Documents—Privilege—Affidavit—Documents referred to in Pleadings—Rules of Supreme Court*, 1883, *Order* XXXI., *r.* 15. Where a party claims privilege against the production of documents on the ground that they supported his own title and do not relate to that of his opponent, his affidavit must be taken as conclusive, unless the Court can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents. *Attorney-General* v. *Emerson* (10 Q. B. D. 191) distinguished. The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards be used in evidence. The decision of Kay, J., affirmed. ROBERTS *v.* OPPENHEIM - - 724

12. —— *Production of Documents—Privileged Communications—Opinions of Counsel—Reports of Sub-Committees.*] Upon a summons by the Defendant that the Plaintiffs—the corporation—might be ordered to produce the documents comprised in their affidavit or documents:—*Held*, that opinions of counsel with reference to these proceedings, whether taken before or after the commencement of the action, were privileged; and the fact that the Defendant was a ratepayer and the opinions might have been paid for out of the parish rates gave the Defendant no special claim to inspection; and also the minutes of the corporation and sub-committees appointed by them to report concerning matters connected with the litigation were also privileged. MAYOR AND CORPORATION OF BRISTOL *v.* COX - - 678

PRACTICE—*continued.*

13. —— *Striking out Affidavit for Prolixity—Rules of Supreme Court*, 1883, *Order* XXXVIII., *r.* 11; *Order* LXV., *r.* 27, *sub-s.* 20.] Although there is no rule of Court specially giving power to the Court to take pleadings or affidavits off the file for prolixity, yet the Court has an inherent power to do so in order to prevent its records from being made the instruments of oppression. Where however an affidavit of documents was of oppressive length, but it appeared to the Court that delay and expense would be caused by filing a fresh one, the Court permitted it to remain on the file but ordered the party filing it to pay the costs of it. Hill *v.* Hart-Davis - - **C. A. 470**

14. —— *Striking out Pleadings—Action on Covenants in a Lease — Statement of Claim — Title to Reversion—Pleading tending to embarrass —Rules of Supreme Court*, 1883, *Order* XIX., *rules* 4, 27.] In an action upon covenants in an expired lease, the Plaintiff stated the lease, that the term had expired, that at its expiration the Defendants were the assigns of the lease, and liable to perform the lessee's covenants, that the Plaintiff became, and at the expiration of the term was entitled to the immediate reversion in the demised property, subject only to the term that he was and is entitled to enforce all the lessee's covenants, and that the Defendants had for eight years paid him rent:—*Held*, such pleading was insufficient, and that the Plaintiff ought also to have shewn what the reversion was which the lessor had, and how the Plaintiff derived his title to that particular reversion.—Accordingly a statement of claim containing the statements so held to be insufficient was ordered to be struck out under Order XIX., rule 27, as a pleading tending to embarrass the fair trial of the action.—*Philipps* v. *Philipps* (4 Q. B. D. 127) followed. Davis *v.* James - - - - **778**

15. —— *Third Party—Contribution or Indemnity—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 55—*Claim for Indemnity from Co-Defendant.*] An action by a vendor against the purchaser of a house and premises, and the auctioneer who advertised and sold them, for specific performance of the contract or damages. The purchaser stated that he was induced to purchase the property in consequence of the advertisement in the newspapers inserted by the auctioneer, representing that the purchase-moneys would be allowed to remain on mortgage. The representation was alleged to have been unauthorized, and the purchaser applied by summons under Rules of Supreme Court, 1883, Order XVI., r. 55, for leave to serve his co-Defendant—the auctioneer—with a notice claiming indemnity from him against the claim of the vendor.—*Held*, that this was not a case for indemnity within r. 55, and that the summons must be dismissed. —*Pontifex* v. *Foord* (12 Q. B. D. 152) followed. Catton *v.* Bennett - - - - **161**

16. —— *Third Party Procedure—Claim to Indemnity over—Appearance of Third Party—Application by Defendant for Directions—Non-admission of Liability—Liberty to appear at Trial —Rules of Supreme Court*, 1883, *Order* XVI., *r.* 48.] Where in an action for damages in respect of alleged injury to the Plaintiffs' premises, the Defendant, claiming to be entitled to indemnity over against a person not a party to the action, had served such person with a third-party notice under Order XVI., r. 48, and he had appeared thereto, the Court, upon a summons for directions taken out by the Defendant, gave the third party, who did not admit his liability, liberty to appear at the trial of the action and take such part as the Judge should direct, and be bound by the result, and ordered the question of his liability to indemnify the defendant to be tried at the trial of the action but subsequent thereto.—In case a third party served with notice appears and admits his liability to indemnify, the Court will give him leave to defend the action.—Form of the order made. Coles *v.* Civil Service Supply Association - - - - **529**

17. —— *Trial—Change of Venue—Action assigned to Chancery Division—Rules of Supreme Court*, 1883, *Order* XXXVI., *r.* 1.] Under Order XXXVI., rule 1, a plaintiff is entitled to lay the venue of an action in any place that he pleases, although it is specially assigned to the Chancery Division, and has been commenced in that Division. Philips *v.* Beale - - **C. A. 621**

—— Administration action—Costs - **179**
See Administration. 1.

—— Charging order - - - - **16**
See Solicitor. 4.

—— Foreclosure action - - - **686**
See Mortgage. 2.

—— Interpleader - - - - **605**
See Sheriff.

—— Married Women's Property Act - **236**
See Husband and Wife.

—— Patent—Particulars of objection—Amendment - - - - **700**
See Patent. 3.

PREFERENTIAL DEBT—Bankruptcy—Proof
See Bankruptcy. 4. **[693**

PRINCIPAL AND AGENT—*Agent for Purchase —Sale of Agent's own Property to Principal—Non-disclosure—Rescission of Contract—Account of Profit made by Agent—Company—Winding-up —Director—Misfeasance — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165.] If an agent employed by a principal to purchase property for him sells to the principal property of his own, which he acquired before the agency existed, concealing from the principal the fact that it is his own property, the principal has a right, on discovering the real facts, to rescind the contract. But, if he declines to rescind, or if, by reason of intermediate dealings with the property, rescission has become impossible, the principal is not entitled to call on the agent to account for the profit which he has made by the sale, i.e. either the difference between the price which he himself gave for the property and the price which he obtained from the principal, or the difference between the latter price and the market value of the property at the time of the sale to the principal.—In 1871 certain coal areas were purchased by a partnership, consisting of six persons, for £5500. In 1873 a company was formed, of which two of the partners were directors, and the property was sold to the company for £42,000, of

PRINCIPAL AND AGENT—*continued.*
which £12,000 was paid in cash and the remainder in fully paid-up shares of the company, the nominal vendor being one of the six persons, who was not a director of the company, and who was really acting as a trustee for the six persons. It was admitted that when the six persons purchased the property none of them stood in any fiduciary relation to the company. In 1875 the company was ordered to be wound up, and in in 1880 the liquidator sold the property. In 1882 a creditor and contributory of the company took out a summons, claiming to make one of the directors who was also one of the six partners, liable, under sect. 165 of the Companies Act, 1862, for a misfeasance by reason of the sale of the property to the company:—*Held*, that, the rescission of the contract having become impossible, no relief could be given against the director.—*In re Ambrose Lake Tin and Copper Mining Company* (14 Ch. D. 390) and *Erlanger* v. *New Sombrero Phosphate Company* (3 App. Cas. 1218) discussed. *In re* CAPE BRETON COMPANY 221

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PROBATE—*Domicil—Will—Construction of Will expressed in Terms of Foreign Law—Revocation of Probate—Jurisdiction of Chancery Division—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 34, 36—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 11.] The fact that probate of a will has been granted by an English Court is not conclusive that the testator was domiciled in England.—If a domiciled Englishman makes a will expressed in the technical terms of the law of a foreign country, so as to manifest an intention that it should operate according to that law, the meaning of the will must be ascertained by the foreign law, and then an equivalent effect must be given to the will in England.—*Studd* v. *Cook* (8 App. Cas. 577) discussed.—Though the Chancery Division may have jurisdiction to recall the probate of a will, it ought not as a general rule to exercise that jurisdiction, even if the estate of the testator is in Court in a proceeding in that Division.—*Pinney* v. *Hunt* (6 Ch. D. 98) followed. BRADFORD *v.* YOUNG - - - - 656

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RENEWABLE LEASE—*Leasehold for Lives—Settlement on Trust for Tenant for Life and Remaindermen—Overriding Trust for Renewal—Renewal become impossible—Purchase of Reversion by Assignee of First Tenancy for Life and ultimate Remainder—Rights of other Cestuis que Trustent.*] A leasehold for lives was devised by a testator who died in 1820 to trustees, on trust for a tenant for life and other persons in remainder, the ultimate remainder in fee being given to the tenant for life. The first trust was to renew the lease from time to time, paying the necessary fines and expenses out of the rents, or raising them by mortgage. In 1825 the trustees obtained a renewed lease for three lives, one of which was that of the tenant for life. In 1855 and 1859 respectively the other two lives dropped. In October, 1876, the tenant for life contracted to sell all his interest in the property to B., and a conveyance was executed in March, 1879. In December, 1876, the Ecclesiastical Commissioners, in whom the reversion subject to the lease was then vested, and who would not renew the lease, contracted to sell the reversion to B., and in August, 1879, they executed a conveyance to him, the conveyance being expressly made subject to "such trusts, equities, estates, and interests" as then affected the leasehold interest. In June, 1878, the School Board for London, under their statutory powers, took part of the property, and in January, 1880, they paid the purchase-money and compensation money into Court. The legal estate in the lease was outstanding in the representatives of the last surviving trustee of the will:—*Held*, that, irrespectively of the form of the conveyance of the reversion to B., it was, according to the ordinary doctrine of a Court of Equity, impossible for him to purchase the reversion otherwise than as a trustee for the persons interested in the lease under the trusts of the will, and that, subject to his right to be recouped the purchase-money, he was only entitled to an order for payment on the

RENEWABLE LEASE—*continued.*
interest on the fund in Court during the life of the tenant for life under the will.—*Hardman* v. *Johnson* (3 Mer. 347) distinguished. *In re* LORD RANELAGH'S WILL - - - - 590
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SETTLED ESTATES ACT, 1877 (40 & 41 *Vict. c.* 18), *s.* 50—*Petition for Confirmation of Contract for Sale—Consent of Married Woman—Examination—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75, *ss.* 1, 2.] Notwithstanding the provisions of s. 50 of the Settled Estates Act, 1877, that when a married woman consents to an application to the Court under the Act, she is to be examined apart from her husband as to her consent, such an examination is not now necessary in the case of a woman who has married since the commencement of the Married Women's Property Act, 1882. RIDDELL *v.* ERRINGTON. - 220
SETTLED LAND ACT, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7, 10, *cl.* (*i.*); *s.* 58, *sub-s.* (1), *cl.* (*ix.*) *—Limited Owner—Power of Sale—"Person entitled to the income of land."*] Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A.'s children and issue. The trustees of the life estate were directed to enter into possession of and manage the property, pay outgoings, keep down the interest on incumbrances, and during A.'s life pay out of the residue an annuity of £400 to the person next entitled in remainder, and pay the ultimate residue to A. The estates were so heavily encumbered that after payment of outgoings and interest there was not enough to pay the annuity of £400. A. therefore had received nothing, and there was no prospect of his receiving anything for many years:—*Held*, (affirming the decision of Bacon, V.C. (24 Ch. D. 583), that A. was a person entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management, within the meaning of the Settled Land Act, 1882, sect. 58, sub-sect. (1), clause (xi.), and therefore possessed the power of selling given by the Act to tenants for life. *In re* JONES 736
2. —— (45 & 46 *Vict. c.* 38), *s.* 58, *sub-ss.* 4, 6—*Tenant for Years determinable on Life—Tenant for Life—Estate determinable with Lease.*] A testator gave to his trustees a house and premises then subject to a lease for thirty-one years at a rent of £50, upon trust to permit his wife to receive the rent during the remainder of the term if she should so long live, and in case she should die before the expiration of the lease he gave the premises to other legatees: but if she should live beyond the term of the lease, then the trustees were to sell the premises and invest a sufficient

SETTLED LAND ACT, 1882—*continued.*

sum to produce an annuity of £50 for his wife, and he gave the residue of such proceeds of sale and the amount invested, after the death of his wife, to the aforesaid legatee; and the testator declared that his wife should have no power to incumber her life estate nor to vest the same in any other person. The lessee of the house, before the expiration of the thirty-one years' term, desired to surrender the lease and to take a new lease at a rent of £85:—*Held*, that the widow was not a tenant for life within the Settled Land Act, 1882, s. 58, so as to enable her to accept a surrender, and to make a new lease of the property. *In re* HAZLE'S SETTLED ESTATES **428**

SETTLEMENT—*Construction*—"*Eldest Son*"—*Portions for Younger Children*—*Younger becoming the elder son*—*Estates sold under paramount Title, and also under Incumbered Estates Act to pay off Incumbrances.*] By a marriage settlement an estate was settled on the wife and the husband successively for life, with remainder to trustees for a term of 600 years, and subject thereto to the first and other sons in tail. Other estates were settled free from the portions term, but subject to prior charges which entirely absorbed them. The trusts of the term were if there should be any child or children of the husband and wife other than or besides an eldest or only son, who by virtue of the limitations should for the time being be entitled to the hereditaments and premises, to raise for the portions of such child or children other than or besides such eldest or only son, £5000, to be vested in such of them as the husband and wife, or the survivor, should appoint, and in default of appointment equally. There were three children of the marriage, two sons and a daughter. In 1841 the estate was sold, under a paramount title, and produced a sum of about £2400. In 1842 the eldest son died an infant. In 1882 the surviving tenant for life died and the portions became payable. There had been no appointment. The younger son who had become the elder and had attained twenty-one claimed to take a share with his sister of the £2400:—*Held*, that the effect of the settlement was to give £5000 to the sister as a first charge on the estate, and the rest of the estate to the brother, and whether the value of the residue were more or less than the portion, or as in this case, nothing at all, the brother had no right to claim any share in the prior charge. REID *v.* HOARE - - - - - - **363**

2. —— *Construction*—"*Eldest or only Son.*"] Sir C. D. (who died in 1857), by deed in 1852, appointed a fund to trustees in trust for his daughter Lady W., for life and after her death in trust for the child or all the children, "except an eldest or only son," if more than one, of Lady W., who should attain twenty-one or marry; and failing such trusts then over. Lady W. died in 1883, having had four children only, viz., Thomas, her eldest born son, who attained twenty-one in January, 1869, and died in April following, Sir F. W., who attained twenty-one in 1880, Helena, who attained twenty-one in 1865, and Edith, who died in infancy, in 1864; so that the fund vested in Helena (subject to let in other children) in the lifetime of the eldest born son, and before he

SETTLEMENT—*continued.*

attained twenty-one. At the date of the deed certain estates stood limited under a settlement, to which Sir C. D. was a party, to the use of Sir T. W. (the husband of Lady W.) for life with remainder to the use of the first and other sons of Sir T. and Lady W., in tail male. In March, 1869, Sir T. W. and his son Thomas, disentailed the estates, and limited them to the appointees of both, or of the survivor. The joint power was not exercised; but after the death of Thomas, Sir T. W. by will appointed the estates to Sir F. W. for life, with remainder to his sons in tail male. Upon Lady W.'s death Sir F. W. claimed half the fund, and Helena, the whole of it:—*Held*, that, if the expression "eldest or only son," was to be read as referring to a son entitled under a settlement to settled estates, the time for ascertaining the excluded son would be the time for distributing the younger children's portions; but that if that expression was to be read according to its natural meaning, the time of vesting would be the time for exclusion:—*Held*, also, that the words an "eldest or only son" primâ facie mean an individual, and that as there was an eldest son in existence when the provision vested in Helena, the clause of exclusion applied to him, and its operation was exhausted, so that any other son who attained twenty-one was entitled to take. And *held*, accordingly, that Sir F. W. was entitled to one half of the fund.—*Mathews* v. *Paul* (3 Sw. 328) observed upon. DOMVILE *v.* WINNINGTON **382**

3. —— *Construction*—"*Issue*"—*Power of Appointment*—*Invalid Appointment by Will*—*Election.*] There is no inflexible rule that if the word "issue" is evidently used in one clause of a settlement as meaning "children" only, it must be construed in the same sense in every other clause. A marriage settlement contained a power for the wife to appoint by will among the issue of the marriage, and, in default of appointment, the trust fund was to be in trust for the issue of the marriage, if more than one in equal shares, the son or sons at twenty-one, and the daughter or daughters at twenty-one or marriage; and, in case there should be but one child issue of the marriage, or, if more than one, all but one should die without having become entitled, then in trust for such only or surviving child; and in case there should not be any issue of the marriage, or all such issue should die without having become entitled, then upon other trusts:—*Held*, that the word "issue" in the power of appointment must be construed in the strict technical sense, and that an appointment by the wife to the children of a deceased son was valid. The wife appointed another part of the fund on trust for another living son for his life, with remainder to his child or children who should attain twenty-one, if more than one in equal shares. The testatrix also bequeathed property of her own to the persons who were entitled in default of appointment. It was admitted that the appointment to the children of the living son was void for remoteness:—*Held*, that, the appointment being ex facie void, the will must be read as if the appointment had not been contained in it, and that the persons entitled in default of appointment were not bound to elect between the interest which they took in

SETTLEMENT—*continued.*

that way, and the benefits given to them by the testatrix out of her own property. *In re* Warren's Trusts - - - - - - 208

4. —— *Covenant to settle after-acquired Property of Wife.*] By an ante-nuptial settlement made in 1870 the intended husband and wife respectively covenanted with the trustees that all the estate, property, and effects, real or personal, of or to which the wife, or the husband in her right, should at any time during the coverture become seised, possessed, or entitled, should be assured and settled, as regarded personal estate, upon trust, as to such part thereof as should not consist of money or authorized investments, or of interest determinable on the death of the wife, upon trust to convert it, and to invest the proceeds, and such part of the estate as should consist of money, upon such investments as therein mentioned, and during the joint lives of husband and wife pay "the interest, dividends, and annual proceeds thereof" to them in equal shares, the share of the wife to be for her separate use without power of anticipation. By a deed of the same date the wife's father covenanted with the trustees to pay to them an annuity of £500 to be applied by them upon trusts corresponding with those of the income of the personal property mentioned in the covenant. In 1874 the wife's father bought up the husband's interest in this annuity, and assigned it to trustees for the wife's separate use with no restraint on anticipation:—*Held* (affirming the decision of Pollock, B.), that the covenant to settle included life annuities given to the wife, that the share assigned by the wife's father in the annuity of £500 was bound by the covenant, and that during the joint lives of the husband and wife, three-fourths of the annuity belonged to the wife for her separate use with a restraint on anticipation, and the remaining fourth to the trustee of the husband, who had become bankrupt, and that persons to whom the wife had mortgaged the interest assigned in 1874 took nothing. Where a covenant has been entered into for settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant.—*In re Maincaring's Settlement* (Law Rep. 2 Eq. 487) observed upon. Scholfield *v.* Spooner - C. A. 94

5. —— *Rescision of Settlement—Non-solemnization of Marriage.*] By a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, the property of the intended wife, which had been transferred by her two trustees, should be held by them on trust for the benefit of the intended wife, the intended husband, and the issue of the intended marriage. The marriage was not solemnized, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother against the trustees of the settlement, to obtain a transfer of the fund to the mother:—*Held*, that the contract to marry had been absolutely put an end to, and that the Court could order the stock to be transferred to the lady. Essery *v* Cowlard - - 191

SETTLEMENT—*continued.*

6. —— *Settlement of Business on Trust for Successive Tenants for Life—Loss during First Tenancy for Life—Profit during Second Tenancy for Life—Apportionment of Loss between Persons interested.*] In an action to execute the trusts of a settlement, by which (inter alia) a business was assigned to trustees on trust for successive tenants for life and remaindermen, a receiver and manager was appointed to carry on the business. During the life of the first tenant for life the business was carried on by the receiver at a loss; during the life of the second tenant for life profits were earned:—*Held*, that the loss must be made good out of the subsequent profits, and not out of capital. Upton *v.* Brown - - - 588

—— Power of appointment - - - 358
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—— Power to appoint new trustees - 417
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SHARES—Pledge of—Blank transfer - 257
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—— Transfer—Refusal to register—Bankruptcy of shareholder - - - 522
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SHERIFF—*Interpleader—Sheriff's Fees—Possession Money—1 & 2 Will. 4, c. 58, s. 6; 23 & 24 Vict. c. 126, ss. 13, 14, 17.*] On the 17th of February, 1881, the sheriff seized goods under an elegit against D. for £72, and interest, and costs. W. claimed the goods as his. On the 19th of February the sheriff took out an interpleader summons. On the 15th of July an order was made for the sheriff to withdraw on W. giving security, in default of security the sheriff was ordered to sell the goods and pay the net proceeds into Court. Security was not given, and on the 12th of August the sheriff paid £52, the net proceeds of the goods, into Court. On the 21st of June, 1882, Chitty, J., made an order that W. should be barred, that the fund in Court should be paid to the execution creditor, and that W. should pay to the execution creditor and the sheriff their costs of the interpleader summons, including in the costs of the sheriff his possession money caused by W.'s claim. The sheriff, not being satisfied that W. could pay him, appealed, asking that his possession money might be paid out of the fund in Court in priority to the claim of the execution creditor. In the meantime the money had been paid to the Plaintiff:—*Held*, by Cotton and Bowen, L.JJ. (dissentiente, Fry, L.J.), that 23 & 24 Vict. c. 126, s. 17, making a summary decision under the Act final and conclusive against "the parties," did not make it final against the sheriff. and that he could appeal:—*Held*, by the whole Court, that where an interpleader has been directed on the application of the sheriff, and the claim of the third party fails, the strict form of order upon which the sheriff is entitled to insist, is to direct the execution creditor to pay the sheriff's charges of the interpleader, with a remedy over to the execution creditor against the third party, though it is a common form of order simply to order the third party to pay them to the sheriff. Smith *v.* Darlow - - - - C. A. 605

—— Forcible entry—Attachment - - 644
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SHIPBUILDING CONTRACT—Validity - 510
See BANKRUPTCY. 3.

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See COPYRIGHT. 1. [374

SLANDER—Injury to business - - 306
See DEFAMATION.

SOLICITOR—*Bill of Costs—Practice—Taxation of Costs—Country Solicitor—Journeys to London.*] Upon a summons by a solicitor for an order directing the Taxing Master to review his taxation of a bill of costs:—*Held*, that the journeys of a country solicitor to town to attend counsel and otherwise to conduct the proceedings in an action ought to be allowed, where the solicitor had authority from his client to make these charges; but that such journeys to town ought not to be allowed simply on the principle that the country solicitor would probably be better acquainted with the subject-matter than his London agent.—*In re Foster* (8 Ch. D. 598) dissented from. *In re* STORER - - - 189

2. —— *Bill of Costs—Suit for Administration—Taxation of Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August*, 1882, *r.* 2—*Costs for Conveyancing Business in an Action.*] Solicitors who transact conveyancing business in an action will, under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), and the General Order of August, 1882 (W. N. (1882) pt. II. p. 358), be allowed taxed costs and charges for such business, according to the scales set forth in the schedules to the General Order.—The proper construction of the language of sect. 2 of the Solicitors' Remuneration Act, 1881, is that it refers to conveyancing matters which take place in an action as well as to those out of Court, and that the exception is only from "other business" not being conveyancing business; and accordingly where the Taxing Master had disallowed certain charges made for conveyancing business in an action, and under the scales of charges contained in the schedules to the General Order of August, 1882, he was directed to review his taxation. STANFORD *v.* ROBERTS [155

3. —— *Bill of Costs—Taxation—Power of Taxing Master to disallow Items caused by Negligence.*] The Taxing Master in taxing a bill of costs between a solicitor and his client has power to disallow the costs of proceedings in an action conducted by the solicitor which were occasioned by the negligence or ignorance of the solicitor. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to bring an action for negligence against the solicitor. *In re* MASSEY & CAREY - - - - - C. A. 459

4. —— *Lien—Charging Order for Costs—23 & 24 Vict. c.* 127, *s.* 28—*Time for raising Costs.*] A decree for administration of a testator's estate was made at the suit of an infant who was entitled to a contingent reversionary share in the estate. R. was solicitor for the Plaintiff and for J. and A., two of the persons entitled to the other shares. After decree he ceased to be solicitor for these parties, and obtained an order directing taxation of his costs as their solicitor in the action, including the costs of the application, and charging their shares in the estate with the payment of such costs, with liberty to apply to have them raised. He now, the cause not yet having been heard for further consideration, applied to have the costs raised by a sale of the shares charged:—*Held*, affirming the decision of Bacon, V.-C., that the application was premature, and that no order ought to be made for raising the costs until the cause was heard for further consideration. *In re* GREEN. GREEN *v.* GREEN [C. A. 16

5. —— *Retainer—Authority to issue Writ.*] A retainer to a country solicitor does not justify an action in which his London agents are the solicitors on the record.—A., an illiterate woman, being desirous of knowing whether there was any balance coming to her, as administratrix of C., her deceased husband, out of the proceeds of a sale by the mortgagee of property mortgaged by C., gave to B., a country solicitor (who had recovered judgment in an action against her, as administratrix, for a debt due to him from her deceased husband) this written retainer: "I hereby authorize you to act as my solicitor in the administration of my late husband's estate, and authorize you to investigate the accounts of the mortgagee, and take such steps as you may think proper in the matter on my behalf."—A writ was subsequently issued by a London firm of solicitors in the names of A. and B., as Plaintiffs, claiming an account of the proceeds of sale of the mortgaged property and payment of the balance, the claim by A. being "as legal representative of C." by B. "as a creditor of C. who had obtained judgment against A., and had obtained execution by the appointment of a receiver of the balance due from C."—Upon motion by A. that her name might be struck out of the writ as having been issued without her knowledge and without any authority on her part:—*Held*, that the retainer was not sufficient to justify the issue of the writ; but, whether sufficient or not, it was a retainer to B., and did not authorize the London firm to issue the writ in the name of A. as her solicitors. WRAY *v.* KEMP - - - - 169

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TENANT FOR LIFE—*Custody of Title Deeds—Trustee in Bankruptcy—Life Estate of Bankrupt's Wife.*] The trustee in bankruptcy of a husband, whose wife is legal tenant for life of land (not to her separate use) has no absolute right to the custody of the title deeds of the land during the coverture, but the Court has a discretion as to the custody.—In a case in which there was evidence that a bankrupt's wife was about to apply to the Divorce Court for the dissolution of the marriage: —*Held*, that the title deeds of land, of which she was legal tenant for life, ought not to be delivered to the trustee in the bankruptcy, but ought to be retained in Court, where the County Court Judge had, upon the trustee's application for delivery to him, ordered them to be deposited.—Per Cotton, L.J.—Whether, under ordinary circumstances, an assignee from a husband of his right to receive during the coverture the rents of land of which his wife is legal tenant for life, is entitled as a matter of course to the custody of the title deeds. *Quære.* *Ex parte* Rogers. *In re* Pyatt - - - - - C. A. 31

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TRADE-MARK—*Registration—Entry on Register of Note limiting User—Ex parte Application—Trade-marks Rules*, 1883, *r.* 32.] Objections having been raised by the owner of a registered trade-mark to the proposed registration of another trade-mark for use in connection with goods included in classes for which the first mark was used, but no formal opposition having been lodged to the application for registration, an agreement was entered into between the registered owner and the applicant that no formal opposition should be lodged; that the applicant should use his mark in connection only with goods actually exported to certain specified countries; and that he would, in connection with the registration, cause a note of this restriction on the use of his trade-mark to be entered on the register. Upon an ex parte application by the applicant, in pursuance of this agreement, the Court directed the Comptroller of Trade-marks to enter such a note on the register. *In re* KEEP'S TRADE-MARK - - - - 187

2. —— *Registration — New Name for New Article — Improper Registration — Injunction — "Heading"—Trade-marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10.] L. & E. invented in 1873 a process for making a certain description of lubricating oil which they called "Valvoline," and in that year registered in America as their trade-mark, the word accompanied by a device. In August, 1877, they registered the same trade-mark in England, and in February, 1878, registered the word "Valvoline" alone as their trade-mark. After this mark had been five years on the register they commenced an action against W. to restrain him from selling under the name of Valvoline any oil not made by the Plaintiffs. W. moved to rectify the register by striking out the trade-mark "Valvoline." The Court came to the conclusion on the evidence that L. & E. had not used "Valvoline" alone as a trade-mark, either in America or England before the passing of the Trade-marks Registration Act, 1875, but only in conjunction with a device, and that "Valvoline" was a word invented to describe the particular class of oil at the same time as the process was invented, and was used as a descriptive term for that particular kind of oil. The process was not the subject of a patent:—*Held*, that where a person seeks to remove a trade-mark from the register the onus is upon him to shew that it ought to be removed, but though his own evidence may be insufficient for the purpose, the onus is discharged if it appears from the evidence of the owner of the mark that it ought not to be

TRADE-MARK—*continued.*
on the register.—Whether a word used alone as a trade-mark in a foreign country before the passing of the Trade-marks Act, 1875, can be registered under the Act if it has not been so used in this country, *quære*:—*Held*, further, that a single word cannot be registered under the Act, on the ground that it was used as a "heading," unless it was so used before the passing of the Act: *Held*, therefore, affirming the decision of Pearson, J., that the trade-mark "Valvoline" must be removed from the register.—If a person who invents a new process for making a new article invents at the same time a new name for describing such article, and the article comes to be known by that name only, he cannot afterwards, when everybody is at liberty to make that article, claim a monopoly in the name:—*Held*, therefore, affirming the decision of Pearson, J., that the Defendants were not by using the name "Valvoline," which was the only name by which the substance in question was known, infringing any rights of the Plaintiffs, or representing their goods as made by the Plaintiffs, and that the fact that the Plaintiffs had in consequence of the registration enjoyed a practical monopoly of the name for five years did not, as the name had been improperly put in the register, give them any better right than they would otherwise have had.—Per Fry, L.J., *semble*, a "special and distinctive" word within the meaning of the Act, must be a word intended to distinguish articles manufactured by one person from similar articles manufactured by other persons, and not a word merely descriptive of the articles themselves. *In re* LEONARD & ELLIS'S TRADE-MARK. LEONARD & ELLIS *v.* WELLS - - - C. A. 288

3. —— *Registration—Person "aggrieved"—Person not carrying on Business in England—Trade-marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 5.] R. & Co. registered a trade-mark for brandy in England. M. & Co., who carried on business at Madras, but neither carried it on nor intended to carry it on in England, applied to rectify the register by striking out the name of R. & Co. and substituting that of M. & Co. as owners of the trade-mark, alleging that they, M. & Co., were the owners of the trade-mark, and had instructed R. & Co. to register it in the name of M. & Co., instead of which R. & Co. had registered it in their own name.—*Held*, by Pearson, J., that as M. & Co. neither used nor intended to use the trade-mark in England, they were not entitled to registration of it in England, and could not be persons aggrieved within the meaning of the Trade-marks Act, 1875, sect. 5, and that on this ground the application must be refused without entering on the merits.—*Held*, on appeal, that assuming M. & Co. to have no right to register the trade-mark in England, it did not follow as a necessary consequence that they could not be aggrieved by its being registered here in the name of another person, and that the case must be dealt with on the merits.—Whether in order to entitle a person to have a trade-mark registered, he must be carrying on or intending to carry on business in England, *quære*. *In re* RIVIÈRE'S TRADE-MARK [C. A. 48

4. —— *Registration — Non-user — Abandonment.*] In order to deprive a manufacturer of

TRADE-MARK—*continued.*
his right to a trade-mark, the use of which has been practically given up for a period of five years, mere discontinuance of user for lack of demand, though coupled with non-registration, and non-assertion of any right, is not enough: there must be evidence of distinct intention to abandon.—In 1874, A., a German soap manufacturer, adopted a trade-mark for a particular kind of soap, which for about two years was manufactured and sent to this country in large quantities for exportation to Australia, but from 1876 until 1882 the manufacture and sale of soap thus marked fell off, until it practically ceased, and the existence of the particular mark was in May, 1882, forgotten by A.—In 1880, B., a manufacturer of soap in the same part of Germany, adopted, in complete ignorance of A.'s mark, a precisely similar mark for soap sent to this country for exportation to Australia, and in August, 1880, he registered his mark under the Trade-marks Acts in this country.—In July, 1882, after the commencement of proceedings by B. to restrain an infringement of his registered trade-mark by A., A. applied for registration of his mark of 1874.—Upon application (1) by B. to restrain the infringement of his trade-mark; (2) by A. to have his trade-mark registered; (3) by A. to have B.'s trade-mark removed from the register:—*Held* (1), that mere non-user by A. of his mark between 1876 and 1882, although coupled with non-registration, did not, having regard to the fact that he had not ceased to carry on his business, and had not broken up the mould, and that a number indicating soap thus marked was retained on his price lists, did not amount to an abandonment by A. of the mark, so as to give B. any exclusive right to his registered mark.—(2) That the existence upon the register of B.'s mark did not prevent the Court from granting leave for the registration of A.'s mark.—(3) That previous bonâ fide registration of B.'s mark in ignorance of any claim by A., followed by large dealings under that mark, prevented A., after the lapse of two years, from getting B.'s mark expunged from the register. Mouson & Co. *v.* Boehm - - - 398

5. —— *Registration—Words Publici Juris—Trade-marks Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 6, 10.] A term which by judicial decision has become open to the trade as the proper description of an article made in accordance with the recipe of the original inventor, and is therefore publici juris, cannot be registered as a trade-mark either alone or in combination with a portrait of the original inventor; and such portrait is not a sufficiently "distinctive device" within the Trade-marks Act, 1875, s. 10, to be capable of registration as a trade-mark per se. *In re* Anderson's Trade-mark - - - - - - 409

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TRANSFER OF SHARES—Blank transfer 257
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TRIAL—Change of venue—Action assigned to Chancery Division - - - 621
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TRUST—Bequest on indefinite trust - 531
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—— For sale—Will—Power to postpone - 42
See Will. 3.

TRUST FUND—Charge on—Creditor - 245
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—— Loss of - - - - - 238
See Trustee. 3.

TRUSTEE—*Carrying on Business—Advances—Charge of Trustee—Right of Creditor against Trust Funds.*] By a marriage settlement a lunatic asylum was assigned to trustees on trust at the request of the husband and wife to sell and stand possessed of the proceeds of the sale for the benefit of the wife and children; but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement:—*Held*, that, whether the trustee would or not have been entitled to be indemnified for moneys advanced by him for the purposes of the asylum, the tradesman had no right to recover his debt out of the trust funds, no special part of the estate having been appropriated for carrying on the asylum.—*Ex parte Garland* (10 Ves. 110) considered. Strickland *v.* Symons [C. A. 245

2. —— *Costs—Tacit Obstruction to Cestui que Trust — Refusal of Representative of deceased Trustee to appoint new Trustees—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—*Rules of Supreme Court*, 1883, *Order lxv., r.* 1—*Jurisdiction to order Respondent to pay costs on Petition under Trustee Act*, 1850.] The executors of the sole executor of a deceased sole trustee whose sole executor had never acted in the trust, were applied to in April, 1883, to take steps to enable the tenant for life of a small sum of stock standing in the name of the deceased trustee to receive the dividends. In May, 1883, the executors handed to the solicitor of the tenant for life the probate of their testator's will, that he might produce it at the Bank of England, which he did. After some correspondence, in the course of which the executors asked for evidence of the title of the cestuis que trust, which did not appear to have been produced, the solicitor of the tenant for life about the end of May sent a power of attorney to be executed by the executors to enable her to receive the dividends. The executors did not execute or return the power. In July the solicitor of the tenant for life applied to the executors to appoint new trustees under the Conveyancing and Law of Property Act, 1881, to which the executors replied, stating their ignorance of the title of the cestuis que trust. Ultimately, in November, 1883, the cestuis que trust presented a petition for the appointment of new trustees and a vesting order:—*Held*, by Pearson, J., that the representative of a deceased trustee is not bound at the request of the cestuis que trust to exercise the power of appointing new trustees

TRUSTEE—*continued.*

given by the Conveyancing and Law of Property Act, 1881; and that the refusal to do so was not a sufficient reason for ordering the executors to pay the costs of a petition for the appointment of new trustees:—But *held* by Pearson, J., that the conduct of the executors, who on the materials before him appeared to have accepted the trust by taking a transfer of the stock into their own names, had been vexatious, and that they must pay the costs which would have been occasioned by a petition simply asking for payment of dividends to the tenant for life, and that they could not be allowed any costs out of the fund.—The executors appealed:—*Held*, that an objection that this was an appeal for costs only was not sustainable:—*Held*, also, that as the cestuis que trust had not taken proper steps to satisfy the executors as to their title, the executors had not been guilty of any such misconduct as is necessary to deprive a trustee of his right to costs out of the trust fund, and that they must have their costs below, but that as the Court of Appeal was not satisfied with their conduct they ought to have no costs of their appeal.—Whether under the Judicature Acts and the Orders of 1883, Order LXV., r. 1, the Court has jurisdiction to order a respondent to a petition under the Trustee Act, 1850, to pay costs, *quære*. *In re* SARAH KNIGHT'S WILL [C. A. 82

3. —— *Executors and Trustees—Loss by Insolvency of Agent—Onus probandi.*] A common order having been made for the administration of a testator's estate, the district registrar by his certificate found the outstanding personal estate to consist in part of book debts amounting nominally to £291, as to £113 part of which he certified that it represented a portion of book debts which the executors had employed H. to collect, and for which H. had not accounted, and had claimed to deduct £55 for remuneration, but that £25 was enough. The certificate went on to say that H. had gone into liquidation, and that no part of the £113 was likely to be recovered. No application was made to vary this certificate. It appeared that H. had collected in all £168, had paid to the executors in April, May, and June, 1880, sums amounting in all to £55, and had gone on collecting without making any further payment to the executors till July, 1881, when a receiver was appointed in the action, but it did not appear when he became insolvent nor at what times the moneys received came to his hands. The action having come on for further consideration:—*Held*, by Chitty, J., that the executors having received the £113 by their agent must be charged with it, less the £25 which the Registrar had held to be the proper amount of remuneration to the agent for collecting:—*Held*, on appeal, that this decision must be reversed, for that where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to shew that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. *In re* BRIER. BRIER *v.* EVISON - - - - - - C. A. 238

TRUSTEE—*continued.*

—— Lunatic—Vesting order - - 745
See TRUSTEE ACTS. 2.

—— In bankruptcy—Custody of title deeds—Wife's estate - - - - 31
See TENANT FOR LIFE.

—— In liquidation—Shareholder in company
See COMPANY. 4. [522

TRUSTEE ACTS—*Amending Order—Death of Sole Trustee intestate—Vesting Order—Conveyancing and Law of Property Act*, 1881, *s.* 30.] Upon the death of a sole surviving trustee intestate, the Court made an order for the appointment of new trustees, and ordered certain lands forming part of the estate to vest in the new trustees "for the estate therein now vested in the heir-at-law of the deceased trustee." After the order had been passed and entered administration was taken out to the estate of the deceased trustee. Upon motion that the order of the Court might be altered by substituting the legal personal representative for the heir-at-law of the intestate trustee in accordance with sect. 30 of the Conveyancing and Law of Property Act, 1881, the Court made a new order, that notwithstanding the previous order, the land should vest in the new trustees "for all the estate therein now vested in the legal personal representative" of the deceased trustee. *In re* PILLING'S TRUSTS. [432

2. —— *Lunatic Trustee—Order vesting Right to deal with the Trust Fund in the Trustees of Sound Mind.*] Although, where one of the trustees of a trust fund becomes lunatic, the Court will not in general vest the right to deal with the trust funds in the trustees of sound mind, but will require a new trustee to be appointed in the place of the lunatic, an order vesting the right to the fund in the trustees of sound mind will be made where the fund is immediately divisible. *In re* MARTYN, A LUNATIC. *In re* TOUTT'S WILL - - - - C. A. 745

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UNITY OF POSSESSION—Right of way—"Occupied and enjoyed" - - - 434
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USER—Limitation of—Registration of trade-mark - - - - - 187
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—— Parts of machine infringing patent - 766
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VENDOR AND PURCHASER—*Vendor's Lien for unpaid Purchase-money—Land in Register County—West Riding Registry Act* (2 & 3 *Anne, c.* 4)—*Waiver of Lien—Sub-Purchaser—Notice.*] A vendor of land in a register county, part of whose

VENDOR AND PURCHASER—*continued.*
purchase-money remains unpaid, is under no obligation to register a memorial of the vendor's lien, but is entitled to rely on his equitable lien against sub-purchasers who have notice of it actual or constructive.—A purchaser of land in a register county is bound to inquire for and examine the deeds and documents memorials of which are registered.—Land belonging to the trustees of a charity, situated in the West Riding of Yorkshire, was sold by the trustees to R. & W., who were estate agents, and bought the land with the intention of selling it in lots for building purposes. Part of the purchase-money remained unpaid, and the vendors retained the deed of conveyance in their possession, but at the request of the purchasers, the vendors' solicitor registered a memorial of it in the West Riding registry. The vendors took no written security for their unpaid purchase-money, but relied on their equitable lien. R. & W. sold the land again in lots.—P. one of the sub-purchasers, who took a mortgage on a small lot, made no inquiries himself, but left it, as he said, to R. & W. to "manage the whole business" for him, and they prepared the conveyance to him.—The original vendors having brought an action to enforce their lien for the unpaid purchase-money against some of the sub-purchasers: —*Held*, that there was no obligation on the original vendors to register a memorial of the vendor's lien. Whether the neglect of the sub-purchasers to search the register and inquire for the deed affected them with constructive notice of the Plaintiffs' lien, *quære*.—But the Court being convinced on the evidence that the vendors knew that R. & W. wanted the deed of conveyance registered for the purpose of selling, and that they did sell, the land in lots, and that by their conduct in registering the deed they had led the sub-purchasers to believe that R. & W. had power to dispose of the land as absolute owners: —*Held*, that the vendors had waived their lien and could not enforce it against the sub-purchasers. —*Semble*, the fact of P. having left R. & W. to manage the business for him was not in itself sufficient to affect him with their knowledge of the lien. Kettlewell *v.* Watson **C. A. 501**

VENUE—Change of—Action assigned to Chancery Division - - - **621**
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VESTING ORDER—Trustee Act - **432, 745**
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VOLUNTARY SETTLEMENT — Mortgage of settled and unsettled property — Consolidation - - - - **391**
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VOLUNTARY WINDING-UP — Resolution appointing liquidator - - **70**
See Company. 5.

WAGES—Preferential debt—Bankruptcy **693**
See Bankruptcy. 4.

WAIVER—Vendor's lien - - - **501**
See Vendor and Purchaser.

WATER—*Underground Water—Pollution of Well —Injunction.*] It being settled law that there is no property in underground water flowing in natural undefined channels, and that a landowner is entitled so to deal with such water on his own land as to deprive his neighbour of it entirely, it follows that he is equally entitled to render the water unfit for use by pouring sewage into it.—The Plaintiff and the Defendant were owners of adjoining lands. Each of them had on his own land a deep well, going down through the London clay into the chalk below to a depth of 300 feet below the surface. The distance between the wells was ninety-nine yards. The Plaintiff's land was at a lower level than the Defendant's. The Defendant turned sewage from his house into his well, and thus, as the Plaintiff alleged, polluted the water in his well.—*Held*, that the Plaintiff had no legal cause of action.—*Womersley* v. *Church* (17 L. T. (N.S.) 190) explained. Ballard *v.* Tomlinson - - - **194**

WAY—"*Right occupied or enjoyed as parcel or member" of the Tenement granted—Unity of Possession of Tenement and Way—Purchase by Railway Company—User for Purposes of Railway.*] A railway company purchased, under the powers of their Act, a piece of land on which was a stable. By the conveyance to the company the premises were granted together with all "rights, members, and appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience and had used it ever since. The soil of this road was not conveyed to the company and no express mention of it was made in the conveyance. The Plaintiff refused to allow the company to use the road:—*Held* (affirming the judgment of Chitty, J.), first, that notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the company, a right of way passed to the company under the general words in the conveyance.—*Kay* v. *Oxley* (Law Rep. 10 Q. B. 360) and *Watts* v. *Kelson* (Law Rep. 6 Ch. 166) followed.—Secondly, that the fact of the stable having been purchased by a railway company for the purposes of their undertaking did not preclude them from claiming the right of way so long as they used the premises as a stable; which they might lawfully do till such time as they were required for the special purposes of the railway, or were sold as superfluous land.—Whether the railway company would be entitled to claim the right of way after they had ceased to use the premises as a stable, and had converted them to some purpose connected with the railway—*Quære*. Bayley *v.* Great Western Railway Company. [C. A. 434

WILL — *Condition — Fee Simple Estate — Name Clause—Forfeiture—Repugnancy.*] A testatrix, who died in 1832, settled her freehold estate upon her grandchildren, a share becoming vested in one of them, Lucy, in fee simple in possession; and the will contained a proviso that any person becoming entitled in possession to the estate should, within one year thereafter, take and use the name of Jones, and that in case any such person should refuse or neglect to use the name of Jones within one year, then the estate limited to him or her should be void, and should first go to her niece, Catherine Jones, since deceased, for her life, and

WILL—*continued.*

after her decease to the person or persons next in remainder under the trusts of the will, in the same manner as if the person so refusing were dead. Lucy was twice married, and neither she or either of her husbands ever took the name of Jones:—*Held*, that the gift being in fee simple, and there being necessarily no person entitled to remainder, the name clause was void, and that there had consequently been no forfeiture by Lucy. MUSGRAVE *v.* BROOKE - - 792

2. —— *Condition—Repugnancy—Devise in Fee—Restraint on Alienation.*] A condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, e.g., to the life of another living person, is void in law as being repugnant to the nature of an estate in fee.—*In re Macleay* (Law Rep. 20 Eq. 186) commented on.—*Large's Case* (2 Leon. 82; 3 Leon. 182) explained.—A testator devised an estate to his son in fee, provided always that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof, in the lifetime of the testator's wife, she should have the option to purchase the same at the price of £3000 for the whole, and at a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices. The real selling value of the estate was, at the date of the will and at the time of the testator's death, £15,000:—*Held*, that the proviso amounted to an absolute restraint on alienation during the life of the testator's widow; that it was void in law; and that the son was entitled to sell the estate as he pleased, without first offering it to the widow at the price named in the will. *In re* ROSHER. ROSHER *v.* ROSHER - - - - 801

3. —— *Conversion—Construction—Trust for Sale—Power to postpone Sale—Direction as to interim Profits—Profits arising from Business pending Sale—Capital or Income.*] A testator devised and bequeathed his real and personal estate upon usual trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and after her death, for his children. The will contained the usual power to postpone the sale and conversion of the real and personal estate, and the usual direction that until sale and conversion the rents, profits, and income thereof should be paid and applied to the same persons and in the same manner as the income of the trust estate. The will contained no reference whatever to the business of the testator, which comprised the bulk of his estate. The executors carried on the business for nearly two years with a view to its sale as a going concern, and the question arose whether the profits of the business during that period were to be treated as capital or income:—*Held*, that the executors had power to carry on the business for a reasonable period with a view to its sale as a going concern; and that, as the testator had expressly directed that the profits of his personal estate until conversion were to be treated as income, the general rule laid down in *Howe* v. *Earl of Dartmouth* (7 Ves. 137) did not apply, and therefore the widow was entitled to the profits of the business.

WILL—*continued.*

Brown v. *Gellatly* (Law Rep. 2 Ch. 751) and *Kirkman* v. *Booth* (11 Beav. 279) distinguished, *In re* CHANCELLOR. CHANCELLOR *v.* BROWN C. A. 42

4. —— *Conversion imperative—Power of Sale discretionary.*] A testator gave an annuity to his wife, and he gave and bequeathed to his seven children all his real and personal estate after deducting the said annuity; and after his wife's decease the annuity, together with all rents, interests, dividends and profits arising from his estate, to be divided between his seven children equally; and he directed his executors to sell and convert into money his furniture, lands, houses, tenements, and other property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all the money arising from the sale to be invested for the benefit of his children:—*Held*, that the direction to convert was imperative, and operated from the death of the testator. *In re* RAW. MORRIS *v.* GRIFFITHS - - - - - 601

5. —— *Direction to Executors to pay Legacies "out of my Estate"—Direction to carry on Testator's Business.*] A testator after giving legacies and annuities, proceeded to say: "My executors may realize such part of my estate as they think right and in their judgment to pay the aforenamed legacies." He then directed his business to be carried on till his son attained the age of thirty, but did not dispose of the profits, nor did his will contain any further disposition of his real or personal estate, except a gift of a particular house. The testator carried on his business in a freehold mill which was his own property. *Held*, by the Vice-Chancellor of the Court of the County Palatine of Lancaster, that the testator died intestate as to his real estate except the house, that his business was to be carried on till the son attained thirty or further order, and that the profits after providing for the legacies and annuities went to the next of kin. That the testator died intestate as to his residuary personal estate, and that an occupation rent should be paid to the heir at law from the testator's death in respect of the real estate and the fixtures forming part thereof which were used in the business. *Held*, on appeal (affirming the decision of the Vice-Chancellor), that the legacies were not charged on the real estate, for that the direction to the executors to realize such parts of his estate as they thought right to pay the legacies was satisfied by holding it to apply to property which they took as executors. *Held* (reversing the decision of the Vice-Chancellor), that so long as the testator's business was continued for the purposes and under the directions of the will, the executors were entitled to the free use and occupation of the business premises, and of the fixed plant and machinery therein without paying any rent for the same. But *held* (varying the decision of the Vice-Chancellor), that the descended real estate could not be affected by the direction to carry on the testator's business any further or otherwise than such carrying on might be necessary for payment of the legacies and annuities given by the will, and that, so soon as they were provided for, the direction to carry on the business became inoperative, and ceased to be binding

WILL—*continued.*

either on the heir at law or the next of kin, and that any surplus profits which had arisen since the testator's decease after providing for the legacies and annuities, must be apportioned between the heir at law and the next of kin according to the values of the real and personal estate employed in the business. *In re* Cameron. Nixon *v.* Cameron - - - C. A. 19

6. —— *Heirlooms—Codicil—Plate—"To A. and his successors"—Leasehold House—"To A. and his successors to be enjoyed with and to go with the title"—Paintings—Statuary and China—"To A. and his successors, to be held and settled as heirlooms and to go with the title"—Absolute Interest—Executory Trust—Settlement—Contents of House—Jewellery at Bankers—Legacies—Pecuniary—Specific—"All Legacies to be paid free of legacy duty"—Legacy Duty.*] A testatrix by a codicil to her will bequeathed to A. C., sixth Earl of E. and to his successors, all her plate, and also gave, devised, and bequeathed a leasehold house to him and "to his successors and to be enjoyed with and to go with the title," and as to all her household furniture, paintings, books, china, and the whole contents of her house, she bequeathed the same to her trustees and executors upon trust that they should in the first place "select and set aside a collection of the best paintings, statuary, and china for the said Earl of E., and his successors, to be held and settled as heirlooms, and to go with the title," and she authorized them to give to the said Earl or his successors any articles of furniture which they should think fit, and as to all the rest and residue of the contents of her house upon trust for her trustees to select presents for her friends, and directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, and the moneys so received to form part of her residuary personal estate, and she directed all the legacies left by her will and codicil to be paid free of legacy duty. The testatrix died possessed of considerable personal estate, which comprised amongst other things a number of articles of jewellery which were at her death in a box at her bankers, which jewellery had been bequeathed to her. It was proved that it had been the practice of the testatrix and also of the former owner to send such box for safe custody to the bankers when they respectively were away from London. *Held*, first, that the plate and leasehold house passed to the sixth Earl absolutely; the words "to be enjoyed with and go with the title" not being sufficient in themselves to create an executory trust or to cut down the interest to a life estate.—*Montagu* v. *Lord Inchiquin* (23 W. R. 592) discussed.—Secondly, that the gift to the trustees of the whole contents of the house upon trust to "select and set aside a collection of the best paintings, statuary, and china, for the said Earl of E. and his successors, to be held and settled as heirlooms and to go with the title" was a clear direction to settle and created an executory trust, and a settlement was directed (to be settled in chambers) giving a life interest to the sixth Earl with remainder to the next heir to the Earldom for his life. Thirdly, that the box of jewellery passed

WILL—*continued.*

to the trustees as part of the contents of the house, that being the locality to which the property ought to be ascribed, although jewellery is merely for personal use and is not appropriated to a house. Lastly, that under the words "all the legacies left by my will and codicil to be paid free of legacy duty," the legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only. *Ansley* v. *Cotton* (16 L. J. (Ch.) 55) discussed and followed. *In re* Johnston, Cockerell *v.* Earl of Essex. [538

7. —— *Indefinite Trust—Communication of Object of Trust to Trustee after Testator's Death.*] A. B. instructed his solicitor to prepare for him a will leaving all his property to the solicitor himself absolutely, but to be held and disposed of by him according to written directions to be subsequently given, and a will was prepared and executed accordingly under which the solicitor was universal legatee and sole executor.—No such directions were however given to the solicitor by the testator in his lifetime, but after his death an unattested paper was found by which the testator stated his wish that X. Y. should have all his property except a small sum of money which he gave to the solicitor. The solicitor claimed no beneficial interest in the testator's property, except to the extent of his legacy, and claimed to hold the rest of the property as trustee for X. Y.:—*Held*, that as the testator had not in his own lifetime communicated to the solicitor the object of the trust no valid trust in favour of X. Y. had been constituted, and accordingly that the solicitor held the property as trustee for the next of kin of the testator. *In re* Boyes. Boyes *v.* Carritt [C. A. 531

8. —— *Lapse—Special Power of Appointment—Death of Appointee in Lifetime of Testator—Child of Testator—Wills Act* (1 *Vict. c.* 26), *s.* 33.] The 33rd section of the Wills Act, which enacts that a devise or bequest to a child of the testator who dies in the lifetime of the testator leaving issue shall not lapse does not apply to an appointment under a special power.—*Freme* v. *Clement* (18 Ch. D. 499) disapproved. Holyland *v.* Lewin [C. A. 266

9. —— "*Unmarried.*"] Although the word "unmarried" is one of flexible meaning, and may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, and, in the absence of any context shewing a different intention, the word will be so construed. *In re* Sergeant. Mertens *v.* Walley - - - - 575

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